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No. ___

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In the Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA A. MCKINNEY; ROBERT BUDJAC;
ROSELYN BUDJAC, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

*ABBE DAVID LOWELL
ROSS A. NABATOFF
MAX HATHAWAY
* *Counsel of Record*

Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:

GRAEME W. BUSH
ALBERT G. LAUBER, JR.
Caplin & Drysdale

EUGENE GRESSMAN
Seton Hall University School of Law

QUESTIONS PRESENTED

1. Whether the forfeiture provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1963, permit the pre-trial restraint of assets owned and possessed by a non-defendant third party that are not "property constituting, or derived from, any proceeds which the person obtained • • • from racketeering activity," within the meaning of 18 U.S.C. § 1963(a).

2. Whether the pre-trial restraint of a non-RICO defendant's untainted assets violates the defendant's right to counsel where the restraint renders the defendant an indigent.

3. Whether the indefinite, and potentially permanent, restraint of untainted assets owned by a third party, violates the Due Process Clause of the Fifth Amendment.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit (App., *infra*, 1a - 13a[1]) is reported at 915 F.2d 916 (4th Cir. 1990). The opinion of the United States District Court for the District of Maryland (App., *infra*, 14a-28a) is unreported.

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[1] "App." refers to the appendix to this petition for a writ of certiorari.

opinion of the United States District Court for the District of Maryland (App., *infra*, 14a-28a) is unreported.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Fourth Circuit entered its judgment on October 3, 1990. It denied Petitioners' request for rehearing with suggestion for rehearing *en banc* on November 9, 1990. App., *infra*, 29a-30a. On January 24, 1991, the Chief Justice extended the time within which to file this petition until March 9, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the U.S. Constitution and the pertinent forfeiture provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), codified as amended at 18 U.S.C. § 1963 (1988), are set forth in the appendix. App., *infra*, 34a-43a.

STATEMENT

This appeal involves an application of the RICO pre-trial restraint and forfeiture provisions. Those provisions: (1) define "tainted" assets derived from a violation of RICO; (2) vest title to such assets in the Government at the time of the criminal violation; and (3) authorize the pre-trial restraint of such tainted assets identified in the indictment pending conviction and a judgment of forfeiture against the RICO defendant. After conviction and the entry of a forfeiture judgment, they also authorize a court to order a RICO defendant

to forfeit his legitimate assets, if insufficient tainted funds remain to satisfy the forfeiture judgment.

Petitioner McKinney is a non-RICO defendant; Petitioners Budjac are third-party non-defendants. Following a four-year Government investigation, a grand jury returned an indictment that neither identified Petitioners' funds nor alleged probable cause to believe that the funds are racketeering proceeds potentially subject to forfeiture. In the absence of such a probable cause finding from the grand jury, the district court held a hearing at which the Government conceded that there was not a "shred of evidence" connecting Petitioners' funds to the proceeds of the alleged racketeering activity and that the funds belonged to McKinney. App., *infra*, 44a. The Government also could not establish that the RICO defendant had ever owned the funds or transferred them to McKinney. Finally, the Government's only witness admitted that the RICO defendant had "millions" of dollars in untainted funds. *Id.* at 46a. The district court determined that the funds "belong" to McKinney (the original transferee), are *not* racketeering proceeds, and the RICO defendant has no interest in, control over, or expectation to receive them. *Id.* at 25a, 26a-28a. Accordingly, it denied the Government's request to restrain the funds.

Without disturbing the district court's findings, the Fourth Circuit reversed. The Fourth Circuit first held that the funds are "substitute assets" *of the RICO defendant*, despite the lower court's finding that they now belong to McKinney and in the absence of any finding that the RICO defendant had once owned them. While acknowledging that the plain language of the pre-trial restraint provision does not permit the restraint of untainted assets, the Fourth Circuit nevertheless restrained the untainted funds owned by the third parties.

I. Statutory Background

In 1984, Congress amended RICO, substantially restructuring and strengthening the statute. Congress added the "relation-back" doctrine of § 1963(c), the "substitute assets" provision of § 1963(m), and substantially modified the restraining order provisions of § 1963(d). As amended, the present RICO restraint and forfeiture provisions create two categories of property -- § 1963(a) property and § 1963(m) property -- that may be forfeited as a result of a RICO conviction. Subsection (a) property is defined as (1) "any interest the person has acquired or maintained in violation of section 1962;" (2) any interest "of any kind affording a source of influence over any enterprise • • • in violation of section 1962;" and (3) "any proceeds • • • obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a) (1988).

The relation-back provision of Subsection (c) vests title to Subsection (a) property in the Government at the time of the criminal offense. 18 U.S.C. § 1963(c) (1988). That provision voids transfers of Subsection (a) property that would otherwise evade forfeiture unless the transferee can establish in post-conviction proceedings under Subsection (l) that his interest was superior to the Government's at the time of the crime or that he is a bona fide purchaser who, at the time of the transfer, was reasonably without cause to believe that the property was subject to forfeiture. Subsection (c) effectively "taints" property that is derived from RICO activity as defined by Subsection (a).

Subsection (d)(1) permits a court to enter a pre-trial restraining order "to preserve the availability of property described in subsection (a)." 18 U.S.C. § 1963(d)(1) (1988). Subsection (d)(1)(A) permits a pre-trial restraining order "upon the filing of an indictment • • •

alleging that the property with respect to which the order is sought" would be subject to forfeiture upon conviction.[2] Such allegations constitute a probable cause finding by a grand jury that the assets identified in the indictment are potentially forfeitable as proceeds of racketeering activity. Accordingly, Subsection (d)(1)(A) permits the Government to obtain a restraining order against the transfer of *tainted* property, that is, the property to which it has obtained title as of the date of the crime under the relation-back doctrine of Subsection (c).

Subsection (m) creates the second category of property -- "substitute assets" -- that may be forfeited under certain circumstances following a RICO defendant's conviction. If Subsection (a) property, "as a result of any act or omission by the defendant," has been substantially reduced in value or is otherwise unavailable for forfeiture, "other property of the [RICO] defendant" may be forfeited up to the value of the unavailable Subsection (a) property. That is, a convicted RICO defendant's *untainted* or *legitimate* assets may be forfeited under Subsection (m) when the tainted property defined by Subsection (a) is devalued or cannot be located. Subsection (m) does not, however, apply to property of a third party. Similarly, the relation-back doctrine and the restraining order provisions of Subsections (c) and (d) do not apply to Subsection (m) property.

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[2] Subsection (d)(1)(B) permits pre-trial restraining orders prior to the filing of an indictment or information where the Government shows that it is likely to prevail on its claim that the property is forfeitable and that its need for the restraint outweighs the hardship to parties against whom the order would be entered. 18 U.S.C. § 1963(d)(1)(B) (1988).

II. Factual Background

The only facts pertinent to the application of Subsection (d)(1)(A) are those relevant to the determination of whether the disputed assets are "tainted" assets "derived • • • from racketeering activity" as defined by Subsection (a). Petitioners set forth those facts below.

A. The Criminal Investigation. McKinney was general counsel and vice-president of Epic Holdings, Ltd. ("EPIC"), the parent company of Community Savings and Loan of Bethesda, Maryland ("Community"). Community agreed to a state receivership in 1985. Shortly thereafter, federal authorities initiated a criminal investigation centered around the conduct of Tom J. Billman ("Billman"), EPIC's majority shareholder. App., *infra*, 15a.

On December 1, 1989, a grand jury returned a sealed indictment against Billman, McKinney, a corporation, and another individual. The indictment charged only Billman and the corporation, *not* McKinney, with violations of the RICO statute. The indictment named McKinney as a co-defendant to various alleged mail and wire fraud violations. *Id.* at 16a. The indictment neither identified any of Petitioners' assets nor alleged that they received any racketeering funds. *Id.* at 19a. Before the grand jury returned the indictment, Billman left the United States and has not been apprehended.

B. The Funds. On May 17, 1989, Barclays Bank of London, England, transferred $499,935.89 to McKinney's

bank account in Detroit, Michigan.[3] *Id.* at 15a. The funds were deposited in her account and Billman had no access or control over them. *Id.* at 25a. Subsequently, McKinney transferred $35,000 to her parents, Petitioners Budjac, to repay a debt.

Since March 1, 1989, McKinney had been receiving monthly installments of $6,250 from William McKnew. These monthly installments represented payment for stock sold by Billman to McKnew but held by Europlan, Ltd.. Billman was neither an owner, shareholder, officer, nor director of Europlan. *Id.* at 15a, 27a. The funds came directly from McKnew and were unrelated to any alleged racketeering activity. McKinney was to receive a total of $50,000 from McKnew pursuant to an agreement between Europlan and McKnew. The wire transfer funds, including the portion currently belonging to Petitioners Budjac, and $15,260 of the McKnew money are the subject of this litigation ("the funds"). On August 15, 1989, the Government obtained an *ex parte* order restraining the funds. *Id.* at 15a.

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[3] McKinney's position as an officer and director of EPIC entitled her to indemnification for any employment-related litigation and settlement expenses. App., *infra*, 48a-49a. She was owed over $550,000 under the indemnification provision. In opposition to the Government's motion, McKinney argued -- among other things -- that she was entitled to the funds under her employment agreement. At the February 14 hearing, the district court found that McKinney's entitlement to the funds under this agreement was irrelevant to the legal issue framed by the RICO pre-trial restraint provisions -- viz., whether the funds were illegal proceeds under Subsection (a). *Id.* at 24a-25a. Accordingly, McKinney did not introduce evidence concerning her entitlement and the court made no findings on that issue.

III. Proceedings Below

A. District Court. On January 30, 1990, the Government unsealed the indictment and sought an injunction pursuant to 18 U.S.C. § 1963 (d)(1)(A) to restrain the funds.[4] At the injunction hearing, the Government acknowledged that there was not "a shred of evidence" connecting the funds to the proceeds of the alleged racketeering activity. App., *infra*, 44a. It also could not establish that Billman had ever owned the funds or had transferred them to McKinney. The Government's witness conceded that Billman owned several legitimate businesses -- not part of the RICO enterprise -- which earned him "millions of dollars", in addition to the $28,835,876 identified in the indictment as tainted proceeds of the alleged racketeering enterprise. *Id.* at 46a.

The Government contended that Subsection (d)(1)(A) nevertheless authorized a restraint based upon the allegation -- which it was unable to prove -- that the assets "came from Mr. Billman." *Id.* at 47a. In support of its contention, the Government stated that Subsection (d)(1)(A) permits the restraint of *any* funds that passed through Billman, even those legitimately received from his "grandmother." *Id.* at 48a.

The district court denied the request for injunctive relief stating that the Government's interpretation of Subsection (d)(1)(A) "represents a substantial oversimplification of the analysis." *Id.* at 19a. The court observed that there are "only two possible avenues by which enjoining respondent's use of the subject assets

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[4] The application of 18 U.S.C. § 1963 involves a federal question that invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331.

would be supported by section 1963." "The first * * * is Subsection (c), which vests in the Government title to 'property described in Subsection (a)' at the time of the predicate RICO acts." *Id.* at 23a. Consonant with the Government's own admission and its proof of over $2 million in untainted, legitimate assets possessed by Billman, the court concluded, however, that the funds are not property described in Subsection (a) and fall outside the scope of Subsection (c). *Id.* at 26a-27a.

"The second avenue by which the Government could potentially justify an injunction in this case is pre-trial application of the substitute assets provision in Subsection (m)."[5] *Id.* at 24a. The court found, however, that "the Government's evidence fails to persuade the Court that the money still belonged to Billman after the wire transfer, [and therefore] subsection (m) could not possibly provide a basis for the injunction in this case." *Id.* at 27a. As to the funds received from McKnew, the court "found the evidence far more tenuous even on the issue whether they actually represented payment of funds to respondent by Billman * * *." *Id.* Finding that "neither possible statutory mechanism justifies an injunction," the district court denied the Government's request to restrain the funds. *Id.* at 27a-28a.

B. Court of Appeals. The Fourth Circuit reversed. The court began its analysis by acknowledging that it was "bound by [the district court's] findings" that: (1) "the Government had failed to prove that these funds were actual RICO proceeds;" and (2) "after the transfer of the funds, they belonged to McKinney." App., *infra*, 6a-7a. The Fourth Circuit nevertheless concluded that following

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[5] Because the court concluded that the funds are not substitute assets, it did not reach the issue whether § 1963(d)(1)(A) permits the pre-trial restraint of such assets.

"Billman's conviction the district court would be authorized by § 1963(m)(3) to order forfeiture of *his* substitute assets." *Id.* at 8a. (emphasis added). It then stated that "McKinney's possession *of Billman's substitute assets* would not defeat the Government's entitlement to forfeiture after Billman's conviction." *Id.* (emphasis added). The Fourth Circuit reached this conclusion because, in its view, "[s]ection 1963(c) protects only those transferees of assets who can establish status as 'a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.'"[6] *Id.*

Having concluded that the substitute assets provision applies to a third party's assets and that the relation-back doctrine applies to substitute assets, the Fourth Circuit reasoned that Subsection (d)(1)(A) requires the

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[6] The Fourth Circuit's application of Subsection (c) to Petitioners' assets contradicts the unambiguous terms of Subsection (c). Subsection (c) applies only to Subsection (a) property, i.e. racketeering "proceeds". The court had already acknowledged that it was bound by the district court's finding that Petitioners' funds are not racketeering proceeds. App., *infra*, 7a. In addition, the bona fide purchaser provision of Subsection (c) does not apply in a *pre-trial* restraint proceeding. The relation-back provision of Subsection (c) does not vest title in the Government to untainted assets. Therefore, the Government has no entitlement to a restraint of such assets. Finally, the Fourth Circuit misunderstood the extent of the proceedings below. The district court did not hold a hearing on Petitioners' bona fide purchaser status and did not receive any evidence on that issue. The Fourth Circuit's conclusion that McKinney was not a bona fide purchaser constitutes an initial factual finding not based on the record. If Subsection (c) applies to those funds, the Fourth Circuit should have remanded to allow Petitioners the opportunity to establish that they are bona fide purchasers.

pre-trial restraint of such assets.[7] It acknowledged that the only "reference * * * made in subsection (d)(1) [is] to property described in subsection (a)." *Id.* at 9a. The Fourth Circuit determined however that limiting Subsection (d)(1) to its terms would "reflect[] an impermissibly narrow construction of RICO forfeiture provisions[.]" *Id.* at 2a. Expanding the scope of pre-trial restraint from tainted to untainted assets, the Fourth Circuit held that "subsection (d)(1)(A) must be read in conjunction with subsection (m) to preserve the availability of substitute assets pending trial." *Id.* at 9a. The Fourth Circuit also concluded that a restraint of indefinite duration of untainted assets legitimately belonging to a third party does not violate due process or the right to counsel, even if, as here, a defendant is left without funds to retain counsel of choice.[8] On November 9, 1990, the Fourth Circuit denied Petitioners' petition for rehearing with suggestion for rehearing en banc. App., *infra*, 29a-30a.

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[7] By its terms, Subsection (d)(1)(A) provides that a district court "*may* enter a restraining order." 18 U.S.C. § 1963(d)(1)(A) (emphasis added). Petitioners argued before the Fourth Circuit that an appellate court should therefore review a denial of a restraint as an abuse of discretion, not *de novo*. The Fourth Circuit rejected that argument, effectively holding that if a court could order a restraint, then it *must*. This departure from the plain language of the statute will deprive a district court of the discretion Congress intended it to exercise in resolving difficult restraint issues. This is particularly important when -- as here -- a restraint would reach assets not derived from criminal activity and legitimately belonging to third parties.

[8] The Fourth Circuit's decision has compelled the district court to appoint the federal public defender to represent McKinney.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Pre-Trial Restraint of Assets Belonging To A Third Party And Not Derived From Racketeering Activity Presents Substantial And Unsettled Federal Questions Warranting Review

The Fourth Circuit's pre-trial restraint of legitimate assets belonging to a third party raises fundamental -- and unsettled -- issues concerning the application of an important and frequently-invoked criminal statute. First, the Fourth Circuit extended the pre-trial restraint provisions of Subsection (d)(1)(A) to include *untainted* assets. That ruling conflicts with the operative clause of Subsection (d)(1)(A) that unambiguously restricts its application to *"Subsection (a)" racketeering proceeds.* 18 U.S.C. § 1963(d)(1)(A) (1988) (emphasis added). Second, the Fourth Circuit held that the substitute assets provision of Subsection (m) reaches property owned by a third party, without any showing that the RICO defendant once owned the property or has a current (or expected) interest in, or control over, it. That holding contradicts the unambiguous limitation of Subsection (m) to "property *of the [RICO] defendant.*" 18 U.S.C. § 1963(m) (1988) (emphasis added). By the combined effect of these two errors, the Fourth Circuit judicially creates a new classification of assets under the statute and subjects to pre-trial restraint assets that are owned by third parties and bear no connection to criminal activity.

a. The Fourth Circuit's restraint of untainted assets owned by a third party contradicts the unambiguous language of the RICO forfeiture statute. This misinterpretation confuses, and effectively obliterates,

the carefully-drawn statutory distinction between tainted assets under Subsection (a) and substitute assets under Subsection (m). Subsection (d)(1)(A) gives courts the authority to restrain "property described in subsection (a)" -- *i.e.*, racketeering proceeds.[9] Subsection (d)(1)(A) does not refer to Subsection (m), nor does it refer to any property other than the property defined in Subsection (a).

The Court stated in its most recent pronouncement on the RICO restraint provisions that: "'[i]n determining the scope of • • • [these provisions], we first look to [their] language.'" *United States v. Monsanto*, 109 S.Ct. 2657, 2662 (1989) (*quoting United States v. Turkette*, 452 U.S. 576, 580 (1981)). "If the statutory language is unambiguous • • • 'that language must ordinarily be regarded as conclusive.'" *Turkette*, 452 U.S. at 580 (*quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The Fourth Circuit has ignored this fundamental canon of statutory interpretation.

The rationale for limiting pre-trial restraints to Subsection (a) property is evident from the structure of the statute. The Government's interest in Subsection (a) property is protected by the relation-back doctrine of Subsection (c). Under Subsection (c), the Government's interest in Subsection (a) property is superior to that of all but the limited class of claimants who can satisfy the bona fide purchaser test. The statute, therefore, permits the Government to preserve the status quo with respect

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[9] Contrary to the Government's argument to the district court, it is not the source of the funds which triggers the application of Subsection (d)(1)(A), but the fact that the funds are "proceeds • • • from racketeering activity". The district court found -- and the court of appeals did not disturb this finding -- that McKinney's funds were *not* proceeds from racketeering activity. App., *infra*, 26a-27a.

to racketeering proceeds and prevent its dissipation through transfer or other disposition by the RICO defendant.

In contrast, the statute places the Government on an equal footing with third parties as to the RICO defendant's *legitimate* assets. Subsection (c) does not grant the Government superior title in untainted assets, and third parties are entitled to accept transfers of such assets without fear that the Government may later abrogate title. Accordingly, the restraining order provisions do not authorize a court to restrain untainted assets to which the Government has no specific claim and has been afforded no superior rights.

The 1984 amendments confirm Congress' intent to limit pre-trial restraint to racketeering proceeds. As enacted in 1970, the restraint provision -- then Subsection (b) -- authorized the restraint of "any property • • • subject to forfeiture." 18 U.S.C. § 1963(b) (1970), *amended by* 18 U.S.C. § 1963(d)(1) (1988). Prior to the 1984 amendments, RICO did not contain a relation-back or a substitute assets provision. When Congress added these provisions, it introduced the distinction between tainted and untainted assets. As amended, Subsection (d)(1)(A) narrows a court's restraint authority from "any property • • • subject to forfeiture" to *only* "property described in subsection (a)," *i.e.*, tainted assets. That new limitation is part of a carefully-articulated statutory scheme based on the distinction between these two categories of assets. There is no support for the Fourth Circuit's conclusion that Congress intended -- but forgot -- to include untainted assets belonging to a third party in the reach of subsection (d)(1)(A).

"'[O]nly the most extraordinary showing of contrary intentions' in the legislative history [of a statute] will justify a departure from that language." *United States v.*

Albertini, 472 U.S. 675, 680 (1985) (*quoting Garcia v. United States*, 469 U.S. 70, 75 (1984)). The legislative history of the RICO forfeiture provisions contains *no* showing that Congress intended that a court's restraint authority should extend beyond racketeering proceeds. To the contrary, that history establishes that Congress intended to permit the pre-trial restraint of Subsection (a) property *and no other*. A determination whether property may be restrained: "must include a finding of probable cause * * * to believe that the subject property is forfeitable property *as described in proposed section 1963(a)(2)* [the predecessor to current § 1963(a)]." S.Rep.No. 520, 97th Cong., 2nd Sess. 10 n.18 (1982) (emphasis added).

Likewise, the legislative history demonstrates that Congress did not intend the application of pre-trial restraint to substitute assets. Commenting on the proposed pre-trial restraint provisions, the Senate Committee on the Judiciary stated that: "[i]t should also be noted that the restraining order provision applies only to (a)(2) property. It *may not be applied* with respect to other assets that may ultimately be ordered forfeited under the substitute assets provision." *Id.* (emphasis added). The strict statutory distinction between property subject to restraint -- tainted assets -- and that subject only to post-conviction forfeiture -- substitute assets -- reflected by the plain language of the statute is, thus, exactly what Congress intended.

b. The Fourth Circuit's error in applying Subsection (d)(1)(A) to untainted assets is compounded by its application of Subsection (m) to assets owned by a third party. By its terms, the substitute assets provision of Subsection (m) applies only to "property *of the RICO defendant*." 18 U.S.C. § 1963 (m) (1988) (emphasis added). Congress intended this provision to reach only property owned or controlled by the RICO defendant.

Forfeiture in Drug Cases: Hearings on H.R. 2646, H.R. 2910 and H.R. 4110 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 26-27 (1981) ("My amendments would allow the forfeiture of any assets a trafficker has *in his possession* that are not otherwise subject to forfeiture * * * .") (Statement of Rep. Zeferretti) (emphasis added).[10]

In this case, the Fourth Circuit applied Subsection (m) to funds owned by a third party and without any showing that they had once belonged to the RICO defendant or that he ever controlled them. This application contradicts the unambiguous terms of Subsection (m) for two fundamentally important reasons. First, the district court had found that the funds belonged to Petitioners and the RICO defendant had no current interest in them. The Fourth Circuit accepted this finding. Second, the Government had introduced no evidence that the RICO defendant had *ever* owned them. At best, the Government's evidence indicated that the RICO defendant might have directed the transfer of the funds. The Fourth Circuit did not make -- nor could it have made -- initial findings of fact to the contrary. In no meaningful sense, could Petitioners' assets be considered "property of the [RICO] defendant," the essential predicate to the application of Subsection (m).

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[10] Subsection (m) also permits the Government to obtain assets of a RICO defendant held by a third party for safekeeping. Neither this -- nor any other -- purpose of Subsection (m) is implicated by untainted assets legitimately transferred to a third party. The district court specifically considered this aspect of Subsection (m), but rejected any contention that Petitioners are holding the funds for Billman. The court stated that because:

> the evidence of record fails to establish that respondent was merely holding funds which, in reality, still belonged to Billman . . . Subsection (m) could not possibly . . . [apply] in this case. App., *infra*, 27a.

II. The Fourth Circuit's Restraint Of Untainted Third-Party Assets Without a Showing of Probable Cause Will Have A Substantial and Detrimental Impact on Legitimate Commercial Transactions

The Fourth Circuit's ruling eliminates the fundamental statutory distinction between tainted and untainted assets. The elimination of this carefully-articulated statutory scheme dramatically extends the threat of forfeiture to all assets of a RICO defendant and of third parties who conduct legitimate business with him. That decision upsets the expectations of parties who have dealt with the defendant in good faith and increases the ability of the Government -- in unintended ways -- to reach such assets even before it has obtained a conviction. Not only may the Government restrain legitimate assets pending trial but a third party receiving legitimate assets that might have some connection to a RICO defendant may lose title. Under the Fourth Circuit's ruling, if the Government were unable to locate the tainted assets forfeited as a result of the conviction, it could seize the legitimate assets transferred to a third party. The third party can prevail only if he can show that he was a bona fide purchaser without notice of the Government's claim. As articulated by the Fourth Circuit's ruling, any asset having a remote connection to a RICO defendant is potentially subject to forfeiture. No third party transacting business with a RICO defendant prior to his indictment will have any reason to believe that untainted assets received may one day be

subject to forfeiture.[11] In contrast, any third party transacting business with a RICO defendant after his indictment will be unable to satisfy the notice test to retain title to an untainted asset.

The Fourth Circuit's decision thus eliminates the security of legitimate commercial transactions. Under the 1984 amendments to the RICO forfeiture provisions, a defendant and those who had legitimate business dealings with him could proceed with confidence that a pre-trial restraint or forfeiture judgment would not adversely affect their pre-existing transactions, and they could engage in further transactions involving untainted funds. After the Fourth Circuit's decision, no person or organization can accept *untainted* funds that might have even a remote connection to a RICO defendant for any purpose at any time with confidence that those can be retained or utilized without interference from a pre-trial order or a post-conviction seizure under the substitute assets provision. A RICO defendant and third parties receiving legitimate assets will be unable to obtain credit, post collateral, seek medical assistance, or retain counsel; and if they do, such funds will be subject to restraint and forfeiture.[12] All such persons will

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[11] In this regard, the Fourth Circuit's departure from the unambiguous terms of Subsection (d)(1)(A) and (m) unnecessarily places third parties in the impossible position of determining whether persons with whom they transact business may at some time be charged with a RICO violation.

[12] In this case, $35,000 of the restrained funds represents McKinney's payment to her parents, Petitioners Budjac, of a pre-existing debt. Had her parents further negotiated these funds before the restraint, the Fourth Circuit's decision would require the restraint of such funds in the hands of the subsequent transferee as substitute assets of the RICO defendant, despite any proof that the RICO defendant once owned these funds.

effectively be beggared by the indictment even if they have substantial legitimate assets.[13] This draconian result is not justified by the statute, nor was it intended by Congress.

III. Other Courts Applying The RICO Forfeiture Provisions Have Given Effect To The Statutory Limitations And Safeguards Ignored By The Fourth Circuit

The Fourth Circuit's decision is in conflict with decisions of the Court and other courts of appeals and district courts that have recognized the different treatment afforded tainted and untainted assets under the statute. Other courts applying the RICO forfeiture provisions have recognized the statute's well-defined statutory distinction in the treatment of tainted and untainted assets. *See e.g., United States v. Chinn*, 687 F.Supp. 125, 127 (S.D.N.Y. 1988) ("In the absence of any authority for pre-trial attachment of assets not specifically named in Section (1963)(a), and therefore, not covered by Section 1963(d), I decline to order such an extension by judicial fiat.")[14] Courts routinely permit the restraint of a RICO defendant's assets upon a showing that there is probable cause to believe the assets are tainted. *E.g., United States v. Bissell*, 866 F.2d 1343 (11th Cir.), *cert. denied*, 110 S.Ct. 146 (1989)

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[13] The multi-jurisdictional nature of many commercial transactions will further amplify the effects of the Fourth Circuit's decision. Depending upon the jurisdiction in which a restraining order is sought, aspects of a single transaction may be treated differently.

[14] The Fourth Circuit recognized that its decision is inconsistent with *Chinn*. *App.*, infra, 6a.

("probable cause" determination that the assets were derived from drug trafficking); *United States v. Noriega*, 746 F.Supp. 1541, 1543 (S.D. Fla. 1990) (Government required to demonstrate the likelihood that the restrained assets are connected to illegal activity.)[15] It has been an operating assumption of numerous courts, including this Court, that a defendant's legitimate untainted assets may be used to hire attorneys, pay medical bills and make any other payments or transfers that are necessary. *See Caplin & Drysdale, Chartered v. United States*, 109 S.Ct. 2646, 2652 (1989) ("The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing."); *United States v. Nichols*, 841 F.2d 1485, 1505 (10th Cir. 1988) ("a defendant may secure an attorney with any assets in the defendant's possession that are not subject to forfeiture) (footnote omitted).

The Fourth Circuit's decision is also in conflict with the Second Circuit's decision in *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988). In *Regan*, the Second

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[15] The Fourth Circuit's discussion of *Noriega* is incomplete. The Fourth Circuit correctly stated that *Noriega* held that "the government may [not] deprive a criminal defendant of his only assets available for attorneys' fees without [1] any showing that the assets are connected to illegal activity, and [2] • • • affording the defendant an opportunity to contest the seizure." App., *infra*, 12a. The Fourth Circuit then observed that Petitioner had "a full opportunity to contest the Government's claim" to restrain her assets. *Id.* While Petitioners' hearing may satisfy the second prong of the *Noriega* holding, the Fourth Circuit omitted any analysis of the first prong. In this case, the Government failed at the district court hearing to produce any evidence connecting Petitioners' funds to the alleged RICO violations. *Both* prongs are required to satisfy the *Noriega* standard. Indeed, according to the Fourth Circuit, as long as a party receives a hearing, the restraint is valid irrespective of the Government's failure at the hearing to establish probable cause that the assets are connected to racketeering activity.

Circuit upheld a limited pre-trial restraint of assets belonging to a third-party partnership, Princeton/Newport, solely to prevent the dissipation of the commingled Subsection (a)(2) property belonging to several *RICO defendants* occupying managerial positions within the partnership. Because the RICO defendants controlled the non-defendant partnership, a restraint on it was warranted to prevent the RICO defendants from using their control of the partnership to dissipate their own interests in the partnership, which the government claimed were tainted Subsection (a)(2) property.[16] The Second Circuit determined that the *only* justification for a restraint of a third party's untainted assets would be the preservation of racketeering interests that are otherwise directly restrainable as Subsection (a)(2) property. The Second Circuit cautioned, however, that "orders directed at third parties are strong medicine and should not be used where measures that are adequate and less burdensome on the third parties are available." *Regan*, 858 F.2d at 121. (emphasis added).

The Fourth Circuit's decision is in conflict with the Second Circuit's decision in *Regan* that recognized that restraining orders may be used only to preserve Subsection (a) assets for forfeiture. In contrast to *Regan*, the Fourth Circuit restrained assets that are not Subsection (a) assets and are not the RICO defendant's assets. Moreover, no claim can be made in this case that restraint of Petitioners' assets is necessary to prevent dissipation of the RICO defendant's tainted assets. Accordingly, the Fourth Circuit's decision that

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[16] The court stated: "[i]n this case * * * this purpose would not be served by allowing the Princeton/Newport Group to continue to exercise unrestrained power over potentially forfeitable funds when the *defendants in the RICO action occupy crucial managerial positions within the Group*." *Regan*, 858 F.2d at 120. (emphasis added).

there are *no* limits on the assets that may be restrained under Subsection (d)(1)(A) conflicts with the Second Circuit's holding that restraining orders may be imposed on a third party's untainted assets only to protect Subsection (a) assets.

IV. The Fourth Circuit's Indiscriminate Restraint Of Untainted Assets Upsets The Sixth Amendment Balance Embodied In The RICO Forfeiture Provisions And Recognized By The Court In *Caplin & Drysdale*

The Fourth Circuit's application of Subsection (d)(1)(A) empowers the Government to restrain untainted assets indiscriminately and without a probable cause finding by a grand jury or district court that the assets are connected to criminal activity. This empowerment eliminates the substantive safeguards embodied in the RICO forfeiture provisions and impermissibly disturbs the balance Congress has struck between the Sixth Amendment right to counsel and the goal of effective law enforcement. The Court's decision in *Caplin & Drysdale* acknowledges that the strict terms of the RICO provisions establish the outer boundary of pre-trial restraint permitted under the Sixth Amendment.[17] "[T]he forfeiture statute does not

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[17] In *Caplin & Drysdale*, a closely-divided Court held that the post-conviction forfeiture of a RICO defendant's *tainted* funds used to retain counsel did not violate the Sixth Amendment. The four dissenting Justices felt that the Sixth Amendment required an exception to the statutory language to protect a defendant's right to counsel. The majority disagreed, holding that strict adherence to the statute provides sufficient Sixth Amendment safeguards. In this case, the Fourth Circuit has eliminated these precise safeguards. First, the Fourth Circuit permitted the restraint of funds in *no way connected*

(continued...)

prevent a defendant who has *nonforfeitable assets* from retaining any attorney of his choosing." *Caplin & Drysdale*, 109 S.Ct. at 2652 (emphasis added). In the Court's view, the fact that the statute did not restrain a RICO defendant's legitimate assets, but only restrained allegedly tainted assets, made it constitutional under the Sixth Amendment.

The Eleventh Circuit has also recognized the Sixth Amendment limits of the pre-trial restraint provisions. The court held that a defendant has a constitutional right to use assets not derived from criminal activity to retain an attorney of choice:

> [i]f the defendant proves at trial or in a collateral proceeding that prosecutors * * * restrained assets which they knew or should have known to have no connection with criminal activity, a conviction would be in great jeopardy due to a denial of the Sixth Amendment right to counsel of choice.

Bissell, 866 F.2d at 1354 (interpreting the cognate provisions of the Continuing Criminal Enterprise statute, 21 U.S.C. § 848 (1988)). The facts presented here are identical to those discussed by the Eleventh Circuit.

The two essential factual predicates underlying the Court's decision in *Caplin & Drysdale* and the Eleventh Circuit's decision in *Bissell* were: 1) a probable cause finding that the restrained assets were Subsection (a) property; and 2) that such assets belonged to the RICO defendant. The Fourth Circuit permitted the pre-trial restraint of assets in the absence of these two crucial factual predicates. Indeed, the Fourth Circuit acknowledged that the funds are not derived from the alleged racketeering enterprise and, nevertheless,

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[17](...continued)
to criminal activity. Second, the restrained funds do not now belong -- nor have they ever belonged -- to a RICO defendant.

restrained them in violation of McKinney's Sixth Amendment right to counsel of choice. The Fourth Circuit's decision permits the Government to select -- without a probable cause finding by a grand jury or district court -- which assets to restrain prior to trial and casts a cloud over a RICO defendant's assets both allegedly tainted and concededly legitimate. By preventing the use of legitimate assets needed to retain criminal defense counsel, the Fourth Circuit's decision violates the Sixth Amendment and is in conflict in fundamental principal with the decision of the Court in *Caplin & Drysdale* and the Eleventh Circuit in *Bissell*.

V. The Fourth Circuit's Sanctioning Of An Indefinite Restraint Of Untainted Assets Raises Serious Issues Concerning The Due Process Rights Of Defendants And Third Parties

The Fourth Circuit's restraint of untainted funds owned by a third party raises serious constitutional issues under the Due Process Clause. The Fourth Circuit has permitted the restraint of funds proven to belong to a third party and without any finding of probable cause to believe that they are in any way connected to the alleged criminal violations. The Court has held that only "after probable cause is adequately established" may the Government obtain an order restraining any assets. *United States v. Monsanto*, 109 S. Ct. 2657, 2667 (1989). The Fourth Circuit has disregarded this fundamental due process requirement.

The Fourth Circuit's restraint also places a third party's legitimate property beyond his control for an indefinite period. The disposition of a third-party's untainted assets must await an adjudication of the *RICO defendant's* innocence or guilt and, in the event of conviction, a determination whether sufficient tainted

funds and substitute assets of the RICO defendant are available to satisfy a forfeiture judgment. Even then, the district court must exercise its discretion to determine which untainted assets of which third parties will be forfeited. *Each* of these contingencies affecting the disposition of a third party's legitimate property are outside the third party's control and may take -- especially in complex cases such as this -- several years to occur. Similarly, the disposition of McKinney's assets will remain undetermined even *after* she is acquitted. The Due Process Clause does not permit such arbitrary governmental interference with untainted property legitimately owned by third parties.

The fact that the RICO defendant in this case remains at large, despite concerted efforts to apprehend him for over two years, compounds the constitutionally impermissible effects of the Fourth Circuit's restraint. Nothing now scheduled -- or that could now be scheduled -- would lead to a disposition of Petitioners' assets. There is no foreseeable end to the restraint. By its practical effect, the Fourth Circuit's restraint constitutes a *permanent* deprivation of Petitioners' legitimate property without any showing of -- or any attempt to show -- probable cause that the assets are derived from criminal activity or could be subject to forfeiture.

Finally, the Fourth Circuit's expansive restraint implicates the Due Process Clause in another -- equally fundamentally -- way. The lack of a limiting principle or guidelines in the Fourth Circuit's decision deprives third parties of a reasonably clear standard by which to determine whether or when the assets in a transaction are subject to restraint. In this regard, the Fourth Circuit's departure from the unambiguous terms of the pre-trial restraint provision (§ 1963(d)(1)(A)) eliminates the notice to third parties otherwise afforded by

adherence to its language. This has added an additional ambiguity in the enforcement of the RICO provisions. To expect the average person to understand the intracacies of these provisions and apply them to commercial transactions imposes an impossible burden. The Court has had considerable difficulty in defining the operative language of § 1962. For example, a workable definition of a "racketeering enterprise" has proven most elusive. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893, 2909, (1989) ("That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when [a constitutional challenge] is presented.") (Scalia, J., concurring). This inherent vagueness and attendant lack of notice injected by the Fourth Circuit's decision -- if left standing -- would render the RICO restraint and forfeiture provisions unconstitutional.

CONCLUSION

The Fourth Circuit has judicially amended the RICO pre-trial restraint provision by inserting within its scope the precise property Congress intended to leave out -- *viz.*, untainted assets belonging to third-parties. The Fourth Circuit has provided no limiting principle to its decision and its far-reaching implications will disrupt innumerable legitimate commercial transactions, past and future. Its misapplication of the RICO pre-trial restraint provision also has significant constitutional dimensions. By eliminating the substantive safeguards Congress has imposed and which the Court has recognized to be essential to its constitutional application -- including that of a showing of probable cause to believe that the assets are forfeitable -- the Fourth Circuit's decision violates the due process and

Sixth Amendment rights of third parties and non-RICO defendants. Accordingly, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Abbe David Lowell
(Counsel of Record)
Ross A. Nabatoff
Max Hathaway

BRAND & LOWELL
(A Professional Corporation)
923 15th Street, N.W.
Washington, D.C. 20005
(202) 662-9700

(Of Counsel)
Graeme W. Bush
Albert G. Lauber, Jr.
Caplin & Drysdale
One Thomas Circle, N.W.
Washington, D.C. 20036

Eugene Gressman
Seton Hall University School of Law

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-7029

In Re: ASSETS OF TOM J. BILLMAN,

Petitioner,

UNITED STATES OF AMERICA,

Petitioner - Appellant,

v.

BARBARA A. MCKINNEY; ROBERT BUDJAC; ROSELYN BUDJAC,

Respondents - Appellees.

BUTZNER, Senior Circuit Judge:

The principal issue in this appeal is whether 18 U.S.C. § 1963 empowers a district court to enjoin, pending a criminal trial and forfeiture proceedings, the disposition of substitute assets that a fugitive RICO defendant transferred to a third person. The district court denied an injunction, holding that the statute provides authority

to restrain prior to trial only those assets which the government proves are connected to the fugitive's alleged racketeering activity. Because we believe that the district court's dismissal of the petition filed by the United States reflects an impermissibly narrow construction of RICO forfeiture provisions, we reverse.

I

There is little dispute about the facts. The controversy arises out of the transfer of money by Tom J. Billman, a fugitive, to Barbara A. McKinney, who is subject to the personal jurisdiction of the court. A grand jury indicted Billman, McKinney, and another individual for conspiracy to commit mail and wire fraud and for numerous counts of fraud that caused the failure of Community Savings and Loan Association of Bethesda, Maryland. The indictment charged that Billman and McKinney "transferred to Swiss bank accounts proceeds from the conspiracy and scheme and artifice to defraud for the purpose of concealing their ill-gotten gains." Billman -- but not McKinney -- was indicted for racketeering. The indictment also charged that the proceeds derived from the racketeering activity were forfeit pursuant to 18 U.S.C. § 1963(a)(1) and (3).

Before the grand jury returned the indictment, Billman fled the country. The government had been unable to locate him, but McKinney had frequent conversations with him on phones that had been lawfully tapped.

On May 9, 1989, McKinney received an overseas call from Michael Byrd, a London solicitor, who informed her that he and she had a "mutual client." Byrd said, "I'm hoping to receive in the coming week some money, which, ah, I will be forwarding to you." Byrd added that he was not "in funds myself yet, but as soon as I am, I'll arrange the appropriate transfer." Byrd later told an

agent from New Scotland Yard that Billman was his client.

Eight days after Byrd's call, a wire transfer of $499,935.89, originating at Barclay's Bank in London from Byrd's law firm, was credited to an account in the name of McKinney and her mother, Roselyn Budjac, at Comerica Bank in Detroit. The day after the wire transfer, McKinney received a brief, cryptic telephone call from Billman. He said, "It's my understanding that the eagle has flown and landed on your end. Is that correct?" McKinney responded that she had not heard, to which Billman replied, "It should be done, so-ah, normal tomorrow." Billman later added, "Yeah, 703," and concluded the call with "I'll talk to you tomorrow, babe."

From this coded conversation and previously intercepted conversations, postal inspectors determined that Billman and McKinney were setting up a further telephone conversation at a "safe" location within the "703" area code of northern Virginia. The district court authorized a tap to intercept that conversation. Billman called McKinney the next day on the "703" telephone, and they spoke at length about the wire transfer. When Billman asked, "Did you get the money?" McKinney replied, "Yes . . . I got word this morning." Billman then said, "Hope your mother didn't call you on an open line." McKinney responded that she had called her parents from "some place else." Billman apologized for taking so long to effect the wire transfer, and they subsequently discussed how McKinney would use the money. McKinney said that she intended to repay her parents and to pay a $25,000 settlement to "Brickley," a reference to *Brickley v. EPIC*, a case pending in the district court, which McKinney had recently settled for $25,000. Billman then cautioned that McKinney should "make sure, be careful where you get the Brickley money

from," and they discussed that she might borrow the money from a friend or her parents. Billman later asked, "Is McKnew still paying you?" and McKinney answered, "Well, I hope so. I'll wait and see."

According to bank records, McKinney's mother withdrew $500,368.81 from the Comerica account on May 19, 1989, and closed that account. McKinney's parents distributed the money among other accounts and certificates of deposit. McKinney later phoned her parents that she would be a Mabel's place the next day. McKinney's father replied, "Oh, well, good, ah, ah, we took care of the photos and, ah, I, ah, five photos, and I sent the negatives to Mabel. I mailed them, ah, yesterday. . . . Everything went smooth as silk . . . . " McKinney's mother later stated that "we increased, ah, ah, the return." When McKinney said, "I've got to be able to get to" the money "without a penalty," her mother answered, "Well, you can . . . so far as I know."

Bank records also reveal that William C. McKnew was making regular payments of $6,250 to McKinney. The money came from a business transaction between McKnew, Billman, and Europlan Holdings, Ltd., a company located on the Channel Island of Jersey. Michael Dee, a director of Europlan, provided oral and written statements to New Scotland Yard concerning the McKnew transactions. Dee stated that Billman introduced McKnew and Dee. When Europlan subsequently invested $80,000 in McKnew's business, Billman gave Europlan the option of selling its McKnew stock to Billman in three years, at Europlan's cost. Billman subsequently bought Europlan's shares in McKnew's company but requested that the shares remain registered in Europlan's name, with Europlan acting as a "bare trustee or nominee" for Billman.

McKnew later bought the shares from Billman for $80,000, and Billman directed Dee to transfer the shares

in exchange for McKnew's promissory note. However, in April 1989, Billman and McKnew agreed to vary the terms of the sale. Instead of paying $80,000 in 1993, McKnew agreed to make eight monthly payments of $6,250 to McKinney. As Dee stated to an officer of New Scotland Yard, "I felt this transaction very strange as Billman was losing a lot of money from it. I was of the opinion that he did not want the money traceable." McKnew had made four payments to McKinney by the time this litigation commenced. Although the source of the McKnew payments had been carefully laundered at great expense to Billman, it is apparent that McKnew was discharging a debt he owed to Billman by paying McKinney. The debt and subsequent payments were among Billman's assets.

II

The district court entered a temporary restraining order that prohibited McKinney and her parents from disposing of the wire transfer of $499,935.89 and the transfers of $50,000.00 made or being made by McKnew. The parties agreed to extend the TRO until further order of the court. Subsequently, McKinney requested the district court to determine the validity of the TRO, and the United States moved for entry of an injunction restraining expenditure of the funds pending forfeiture proceedings.

At the hearing before the district court, the government proved that Billman and other conspirators transferred $22,000,000 to Swiss bank accounts. The government, however, was unable to trace the funds from the Swiss bank accounts to Barclay's Bank or to Europlan. It proved the transfer of the funds in issue to McKinney by introducing tapes of the intercepted phone calls. Dee's affidavit established the source of the McKnew payments. The evidence also disclosed that Billman had sufficient assets apart from the alleged theft

of Community's deposits to make the payments in issue to McKinney.

The district court held that § 1963 did not authorize a pretrial injunction to restrain assets transferred by the defendant to a third party when the assets were not proved to be proceeds of a RICO offense. It found that the government had failed to prove that these funds were actual RICO proceeds. It also found that after the transfer of the funds, they belonged to McKinney. The court denied the injunction, vacated the TRO, and dismissed the government's petition. The district court's decision is consistent with the only reported case that deals with pretrial restraint of substitute assets int he hands of a third person. *United States v. Chinn*, 687 F. Supp. 125 (S.D.N.Y. 1988).

III

The government may "seize property based on a finding of probable cause to believe that the property will ultimately be proven forfeitable." *United States v. Monsanto*, _____ U.S. _____, 109 S. Ct. 2657, 2666, 105 L.Ed.2d 512 (1989).

The probable cause found by the grand jury satisfies the government's burden of proving the allegations of the indictment. This is evident from the legislative history of the Comprehensive Crime Control Act of 1984, which explains: "For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based." S. Rep. No. 225, 98 Cong., 2d Sess. 203, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3386. Also, the court may admit hearsay evidence at a pretrial restraining hearing. *See* § 1963(d)(3).

There can be no doubt that Billman was the source of the funds sent to McKinney through his solicitor and

through the Europlan transaction. The manner in which the funds were laundered, the use of codes and phones perceived to be safe, and the further laundering of the money for the Brickley settlement are facts that would justify the inference that the funds were part of the $22,000,000 deposited in Swiss banks. These facts would also justify the inference that the tainted funds were not Billman's to give away.

Nevertheless, the district court drew contrary inferences and we are bound by its findings. *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Therefore, we are compelled to conclude for the purpose of this case that the source of the funds was money which Billman did not steal from Community.

IV

Title 18 U.S.C. § 1963(a)(1) and (3) provides:

(a) Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States, irrespective of any provision of State law --

(1) any interest the person has acquired or maintained in violation of section 1962;

* * * * * *

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

A RICO forfeiture pursuant to this statute is not an *in rem* proceeding against guilty assets. The forfeiture is, instead, an *in personam* proceeding against the defendant, and the forfeiture constitutes partial punishment for the offense. *See United States v. Conner*, 752 F.2d 566, 576 (11th Cir. 1985). The government is not required to trace the proceeds of the RICO offense into a specific bank account in order to execute a

forfeiture judgment. *United States v. Robilotto*, 828 F.2d 940, 949 (2d Cir. 1987). Instead, a forfeiture money judgment can be satisfied out of any of the defendant's assets. *United States v. Ginsburg*, 773 F.2d 798, 800-03 (7th Cir. 1985).

These principles are embodied in an amendment to the Act, 18 U.S.C. § 1963(m), which makes provision for the forfeiture of substitute assets:

> (m) If any of the property described in subsection (a), as a result of any act or omission of the defendant --
>
> * * * * * * *
>
> (3) has been placed beyond the jurisdiction of the court;
>
> * * * * * * *
>
> the court shall order the forfeiture of any other property of the defendant . . . .

The indictment alleges that Billman has placed the funds of the defrauded savings and loan in Swiss banks -- that is, beyond the jurisdiction of the court. Consequently, after Billman's conviction the district court would be authorized by § 1963(m)(3) to order forfeiture of his substitute assets.

McKinney's possession of Billman's substitute assets would not defeat the government's entitlement to forfeiture after Billman's conviction. Section 1963(c) protects only those transferees of assets who can establish status as "a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section." McKinney has presented insufficient evidence to show that she qualifies as a bona fide purchaser for value without cause to believe that the substitute assets in her hands were subject to forfeiture. The question remains

whether the substitute assets can be restrained pending trial.

V

Section 1963(d)(1)(A) provides:

> (d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section --
>
> > (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section . . . .

The purpose of § 1963(d)(1)(A) is to preserve pending trial the availability for forfeiture of property that can be forfeited after trial. *See United States v. Regan*, 858 F.2d 115, 119 (2d Cir. 1988). Although reference is made in subsection (d)(1) to property described in subsection (a), we believe that when, as here, the defendant has placed the assets specified in subsection (a) beyond the jurisdiction of the court, subsection (d)(1)(A) must be read in conjunction with subsection (m) to preserve the availability of substitute assets pending trial. In this way the purpose of § 1963(d)(1)(A) can be attained. A district court, construing analogous provisions dealing with forfeiture arising out of trafficking in drugs, has reached the same conclusion with respect to substitute assets held by the defendant. *See United State v. Skiles*, 715 F. Supp. 1567 (N.D. Ga. 1989).

Although neither the Supreme Court nor any court of appeals has addressed the question of pretrial restraint of substitute assets that have been transferred to a third

person, two opinions of the Court afford us guidance. In *Russello v. United States*, 464 U.S. 16, 26-27, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983), the Court, considering the proper construction of the forfeiture provisions of § 1963, emphasized that Congress intended that the statute "shall be liberally construed to effectuate its remedial purposes." In the context of the case before us, the remedial purpose of the Act is to preserve the defendant's assets for ultimate forfeiture if he is convicted. Liberal construction of § 1963 requires reading its several subsections together, rather than in isolation, to achieve the congressional purpose of pretrial restraint.

United States v. Monsanto, supra, dealt with the pretrial restraint of assets that were directly traced to violations of laws prohibiting the distribution of heroin. Speaking of assets in the hands of third persons, the Court reasoned that if there was probable cause to believe that these assets could be forfeited in postconviction proceedings, pretrial restraint was permissible. 109 S.Ct. at 2666. It reached this conclusion by reading the provisions of the drug forfeiture statute together instead of in isolation. 109 S.Ct. at 2664-65. The Court admonished: "Permitting a defendant to use assets for private purposes that, under [21 U.S.C. § 953(c)], will become the property of the United States if a conviction occurs, cannot be sanctioned." 109 S.Ct. at 2665. We have previously noted that the drug and RICO forfeiture statutes should be similarly construed. *See United States v. Amend*, 791 F.2d 1120, 1127 n.6 (4th Cir. 1986). Therefore, *Monsanto* confirms our conclusion that § 1963(d)(1)(A) should be construed to authorize pretrial restraint of those assets specified by subsections (a) and (m) that can be forfeited after conviction.

In summary, we hold that the pretrial restraining provisions of § 1963 do not permit a defendant to thwart the operation of forfeiture laws by absconding with RICO proceeds and then transferring his substitute assets to a third person who does not qualify as a bona fide purchaser for value.

VI

McKinney contends that the continued restraint of funds violates her right to counsel secured by the Sixth Amendment. She argues that the funds were indemnification from EPIC, a corporation in which she served as an officer and director. EPIC was one of Billman's many cooperations that are charged in the indictment as being an association in fact constituting a RICO enterprise. The indictment alleges that Billman and McKinney used Community's deposits to fund EPIC.

McKinney's claims is not supported by the evidence. The indictment alleges that she and another conspirator extracted $644,000 from Community and its subsidiaries and $850,000 from EPIC and related companies for their personal legal fees. McKinney did not testify, and she did not account for this money. In any event, there is no evidence that at the time of the transfer EPIC had any funds. Nor did McKinney prove that EPIC authorized the clandestine transfer of funds through Billman's solicitor and Europlan. Quite properly the district court made no finding that EPIC was the source of the funds the government seeks to restrain. We, too, cannot accept the theory McKinney spins in an effort to give a legitimate gloss to the funds she received from Billman.

In *Caplin & Drysdale v. United States*, ____ U.S. ____, 109 S.Ct. 2646, 2652, 105 L.Ed.2d 528 (1989), the Court explained: "The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." McKinney's reliance on this statement is misplaced. The funds in issue are not

nonforfeitable assets. They are Billman's substitute assets, which § 1963(m) subjects to forfeiture. The government can forfeit a defendant's contraband assets without infringing his Sixth Amendment right to counsel. *See Caplin & Drysdale*, 109 S.Ct. at 2651-56. Moreover, restraint pending forfeiture can be imposed pretrial. *Monsanto*, 109 S.Ct. at 2665-66.

McKinney's reliance on *United States v. Noriega*, 746 F.Supp. 1541 (S.D. Fla. 1990) is also misplaced. The court's order setting that case for hearing disclosed that, without judicial proceedings, the government restrained Noriega's assets. The issue before the court was "whether the government may deprive a criminal defendant of his only assets available for attorneys' fees without any showing that the assets are connected to illegal activity, and without affording the defendant an opportunity to contest the seizure." Here, in contrast, the government followed statutory procedures to seek restraint of the funds transferred to McKinney and afforded her a full opportunity to contest the government's claim.

VII

McKinney also argues that the restraint of funds "for the unlimited duration likely in this case" violates the Due Process Clause. She complains that as long as Billman eludes the government, the funds will be frozen.

In *United States v. $8,850*, 461 U.S. 555, 564-66, 103 S.Ct. 2005, 2012, 76 L.Ed.2d 143 (1983), the Court held that the principles explained in *Baker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), are appropriate for determining the reasonableness of delayed forfeiture proceedings. One of the factors discussed in *Baker* is the reason for delay. Delay caused by the defendant is weighed less heavily than delay caused by the government. 407 U.S. at 531, 92 S.Ct. at 2192.

Delay resulting from Billman's flight cannot be attributed to the government. McKinney aided him by assisting in the transfer of Community's funds abroad. She presently sustains him as a fugitive by forwarding messages left for him on an answering device. She is in no position to complain about the government's inability to bring him to trial.

The judgment of the district court is reversed, and the case is remanded for entry of an appropriate injunction. The mandate shall issue forthwith.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE:	• Docket No. B-89-2310
ASSETS OF TOM J. BILLMAN	•
BARBARA MCKINNEY	• 101 W. Lombard Street • Baltimore, MD 21201 • February 26, 1990
Respondent	•
• • • • • • • • • •	•

TRANSCRIPT OF HEARING ON PENDING
MOTION BEFORE THE HONORABLE
WALTER E. BLACK, JR.
UNITED STATES DISTRICT JUDGE

AFTER RECESS

THE CLERK: Please rise, this Honorable Court now resumes its session.

THE COURT: Welcome back. Counsel, I am prepared to rule on the matter I took some sub curia several hours ago. I will do so by means of an informal oral opinion reserving the right to edit that opinion if it is transcribed for any reason.

Presently pending before the Court are the Government's Motion and Renewed Motion for an Injunction Pursuant to 18 United States Code, Section

1963 (d)(1)(B), and they are Papers 3 and 13 in the Court file, and respondent's Motion to Vacate the Temporary Restraining Order and to Dismiss the Petition for Preliminary Injunction. That's Paper 10 in the Court file. This action arises out of a criminal investigation conducted by the United States Attorney, the United States Postal Inspection Service, and the Grand Jury into the events surrounding the September 1985 collapse of Community Savings and Loan, a state-chartered savings and loan institution that was formerly headquartered in Bethesda, Maryland. The investigation focused on the activities of Tom J. Billman, respondent Barbara A. McKinney, and various other individuals and corporations.

On August 15, 1989, Chief Judge Alexander Harvey, II entered a Temporary Restraining Order against respondent and her parents, Robert Budjac and Roselyn Budjac. The Order prevented these individuals, as well as any others acting on their behalf, from disposing of funds or property received from or at the direction of Billman. The assets delineated under the Order included proceeds of a wire transfer occurring on or about May 17, 1989 in the amount of $499,935.89, as well as proceeds of payments to respondent made, or to be made, by a William McKnew.

The August 15, 1989 Order was entered pursuant to provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 United States Code, Section 1963(d). Section 1963(d) allows, under certain circumstances, for imposition of such orders to preserve assets which, under 18 United States Code, Section 1963(a), are potentially forfeitable as racketeering proceeds upon conviction for violations of RICO, Section 1962. The Government asserted in its motion for the Order that Billman had gained over $25 million in forfeitable assets as a result of racketeering violations,

and that he had previously transferred over $22 million outside the jurisdiction of the Court by means of wire transfers to banks in Switzerland. The assets in respondent's possession subject to the August 18, 1989 Order were allegedly transferred back to this country by Billman or at his direction. On August 16, 1989, the Government filed a Motion for Preliminary Injunction to freeze respondent's assets pending trial on an expected RICO indictment. The August 15, 1989 Order was extended by stipulation of the parties to such time as the Court held a hearing on the Government's motion.

On December 1, 1989, the Grand Jury for the District of Maryland returned a multi-count indictment in Criminal Case Number B-89-0466 charging Billman, as well as other individuals and corporation, with wire fraud, mail fraud, and conspiracy. Respondent McKinney was named as a defendant in many of the counts of the indictment. However, she was not included as a defendant in the count charging violations of RICO, Section 1962(c), which named only Billman, Cryosopt Corporation and its subsidiaries. The indictment alleges that Billman received $28,835,876 in forfeitable proceeds from his racketeering activities. At this juncture, respondent has moved to vacate the August 15, 1989 Order, and for dismissal of the Government's motion for a preliminary injunction. The Government, in turn, has renewed its motion for an injunction, and opposed respondent's motion to dismiss.

The parties are in sharp dispute as to what the Government must establish in order to support a preliminary injunction freezing the assets in respondent's possession until such a time as Billman is brought to trial on the RICO count of the indictment. After briefing by the parties and an evidentiary hearing held on February 14, 1990, the Court invited the parties to supplement their written submissions on this threshold

legal issue. The fundamental questions are whether and upon what proof the Government may seize, prior to trial, assets of a third-party not charged with violating RICO under 18 U.S.C. Code, Section 1963. Section 1963 (a) reads in pertinent part that:

"(a) Whoever violates any provision of section 1962 (the substantive RICO section) ... (inter alia) shall forfeit to the United States, irrespective of any provision of any State law --

(1) any interest the person has acquired or maintained in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."

Relevant provisions of 1963(c) state that:

"All right, title and interest in property described in subsection (a) vests in the United States upon the of commission of any act giving rise to forfeiture under this section. Any such property subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture."

The express authority for pre-trial injunctions to preserve assets which are potentially forfeitable under 1963(a) is contained in 1963(d)(1), which reads:

"Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in Subsection (a) for forfeiture under this section.

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the

order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of any such indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that:

(1) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailab.e for forfeiture; and

(2) the needs to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered;

Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless an indictment or information described in subparagraph (A) has been filed."

The statute also provides for entering of such an order upon *ex parte* motion by the Government if notice of the motion would jeopardize the availability of the subject property. And I'm referring to section 1963(d)(2).

In the instant case, the current temporary restraining order was entered pursuant to the ex parte provision, and was subsequently extended by stipulation between the parties. Because an indictment has since been filed, the Court must now look to whether the requirement of subsection (d)(1)(A) have been satisfied. The indictment section entitled "forfeiture" alleges that:

> 2. The defendant Tom J. Billman has interest he acquired and maintained in violation of Title 18, United States Code, Section 1962(c), all of which interests,

> wherever located and in whatever names held, are therefore subject to forfeiture to the United States of America pursuant to Title 18, United States Code, Section 1963(a)(1) and (3).
>
> 3. The interest of Tom J. Billman subject to forfeiture to the United States of America pursuant to paragraph 2 include, but are not limited to: (a) any and all property constituting or derived from proceeds obtained directly or indirectly from racketeering activity in violation of 18 U.S.C. Section 1962 (c); and (b) cash in the amount of $28,835,876 received as proceeds of the racketeering activity."

Defendant argues that this indictment language cannot support an injunction in the instant case because it lacks required specificity. The Court finds that, under a simpler set of circumstances, the allegations quoted above might well have supported an injunction order. However, the fact that respondent in this case was not indicted under RICO presents the Court with a set of complex issues concerning the identity and ownership of the assets at issue.

The Government argues that it need not trace the asset directly to Billman's racketeering proceeds if it can show that he was the source of the money's transfer to respondent. As the Court reads the statute and related case law, however, this position represents a substantial oversimplification of the analysis. The Government first cites two cases which concerned the level of specificity in an indictment necessary to support a forfeiture after trial upon conviction. Referring to *United States v. Amend*, 791 F.2nd 1120, and 1127 (4th Cir. 1986); and *United States v. Navarro-Ordas*, 770 F.2nd 959, 969 note 19 (11th Cir. 1985), *cert. denied*, 475 U.S. 106 (1986). These cases, which looked to the level of required notice

to a defendant that his assets might be subject to forfeiture, are simply inapposite to the questions at issue in this case.

Next, the Government cites a line of cases beginning with *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1011 (1986), which held that, upon conviction, the actual assets forfeited to the Government were not required to be traced directly to racketeering activity. The courts reasoned that, since a RICO conviction and forfeiture were essentially *in personam* judgments by nature, rather that *in rem* judgments against the assets themselves, non-traceable assets belonging to the defendant's which are equivalent in value to the proceeds of his racketeering activities, may be forfeited, citing at page 798 to 802; referring also to *United States v. Robilotto*, 828 F.2d 940 and 949 (2nd Cir. 1987), *cert. denied*, 108 S.Ct. 711 (1988); *United States v. Caporale*, 806 F.2d 1487, 1508 (11th Cir.), *cert. denied*, 428 U.S. 917 (1986); *United States v. Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

These cases were subsequently codified by an amendment adding Section 1963(m) which provides that:

> "If any of the property described in Subsection (a), as a result of any act or omission of the defendant --
>
> (1) cannot be located upon the exercise of due diligence;
>
> (2) has been transferred or sold to, or deposited with, a third party;
>
> (3) has been placed beyond the jurisdiction of the court;
>
> (4) has been substantially diminished in value; or
>
> (5) has been commingled with other property which cannot be divided without

> difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5)."

While subsection (m) deals on its face with post-conviction forfeiture, the Court recognizes that there exists a split in authority, as to whether the provision authorizes pretrial injunctions concerning substitute assets, as well. And the Court would refer to several of the cases, which I have already mentioned including the one cited by the Government as well as *Chinn*.

However, the Court notes that the *Ginsburg* line of cases and Subsection (m) do not contemplate an injunction which prevents a third party to whom assets have been transferred from gaining access to those assets. At most, the cases and Subsection (m) may be read to authorize pretrial injunctions as to substitute assets belonging to the defendant himself.

The Government relies heavily upon *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988), to support its position that assets of a third party may be the subject of an injunction under 1963(d)(1)(A). The *Regan* court did hold that, under certain circumstances, section 1963(d)(1)(A) "authorizes an order restraining an unindicted third party," quoting from page 119. However, in *Regan*, the potentially forfeitable assets were in the interests of the RICO defendants in a partnership group in which innocent third parties also held interest. The court found that:

> This asset preservation purpose of 1963(d) cannot be achieved if courts graft onto the statute a wholesale bar to restraints on third parties. In this case, for example, this purpose would not be served by allowing the Princeton/Newport Group to continue to exercise unrestrained power over potentially forfeitable funds when the defendants in the RICO

> action occupy crucial managerial positions within the Group."

According to page 120. Consequently, the court ruled that a less intrusive injunction preventing only the RICO defendants from withdrawing their partnership interests from the Group would be inadequate.

The injunction in *Regan*, however, was very limited in nature. It did not totally freeze the Princeton/Newport Group assets, but rather "limited its transaction to those in the ordinary course of dealing," citing to page 121. It also provided for a court-appointed monitor to ensure that only ordinary course of business transactions were taking place. Perhaps the most significant factual element in the *Regan* for the purposes of this case, was that the actual RICO proceeds were within an identified asset pool. The interests of third parties were frozen only because the court found that they were substantially inseparable from the RICO interest which were forfeitable under Section 1963(a).

Moreover, the *Regan* court recognized that "orders directed at third parties are strong medicine," quoting from page 121. Noting that the substitute asset provision of what is now Subsection (m) applied on its face only to the ultimate forfeiture, the court stated that:

> "It surely suggests that restraining orders entered before forfeiture should be concerned with preserving assets equivalent in value to the potentially forfeitable property, and not necessarily the precise property."

The Government, which cites this language in support of its position, takes the language completely out of context, in that the *Regan* court continues:

> "We believe, therefore, that where the nature of the defendants' forfeitable property makes imposition of a restraining order burdensome upon third parties, the district court should, as an alternative, restrain

assets of the defendants equal in value to that of the unrestrained forfeitable property."

Therefore, in this case, if Subsection (m) does in fact authorize pretrial injunctions as to substitute assets, it would apply only to substitute assets of Billman's, and would in no event authorize the freezing of assets belonging to respondent, a third party non-RICO defendant.

The case law cited by the Government thus sheds little light on the precise situation with which the Court is now faced. In the Court's view, there are only two possible avenues by which enjoining respondent's use of the subject assets would be supported by section 1963. This first such avenue is Subsection (c), which vests in the Government title to "property described in Subsection (a)" at the time of the predicate RICO acts. However, Subsection (c)'s explicit reference to "property described in Subsection (a)" clearly indicates that it does not apply to substitute assets. The Government cites the Court to *United States v. Monsanto*, 109 S.Ct. 2656 (1989), and its companion case *Caplin & Drysdale, Chartered v. United States*, 109 S.Ct. 2647 (1989), for the proposition that any property which has passed through the hands of a defendant and on to a third party may be the subject of a pretrial injunction, regardless of whether it is directly traceable to the criminal activities supporting forfeiture. However, the Court finds nothing in either *Monsanto* or *Drysdale* to support the Government's expansive reading of Section 1963.

In *Monsanto* and *Drysdale*, the Supreme Court addressed the criminal forfeiture provisions relating to Continuing Criminal Enterprises, CCE's, 21 United States Code, Section 853, which are analogous to those contained in 18 U.S.C., Section 1963. The Court found that these provisions did not include any implied exemption, either statutory or constitutional in nature,

for funds used by a defendant to pay his defense attorney. Accordingly, in both cases, the Court upheld pretrial injunctions regarding potentially forfeitable funds which would otherwise have been used by the criminal defendants to pay for their defense, citing *Monsanto*, page 2667; and *Drysdale* at 2657. This Court notes that *Drysdale* involved certain funds which had already been paid to the defense attorney's firm, a third party, referring to page 2650.

However, in both *Monsanto*, and *Drysdale* there existed probable cause to believe that the subject funds were proceeds of the criminal activity in question. As such, the Court in both cases was actually addressing whether traceable proceeds which the respective defendants had transferred, or intended to transfer, to their attorneys could be the subject of pretrial injunctions. Thus, neither decision alters this Court's view that, in order to invoke Subsection (c) as a mechanism through which to freeze respondent's assets, the Government would, in fact, have to establish that the assets here at issue were traceable to actual RICO proceeds.

The second avenue by which the Government could potentially justify an injunction in this case is pre-trial application of the substitute asset provision in Subsection (m). However, as indicated by the Court's previous analysis, Subsection (m) could, at most, justify an injunction were the Court to find that the subject assets in fact belong to Billman and are merely being held for him by respondent. The Government argues that an injunction would be appropriate if it established merely that respondent were not entitled to the assets in some way. In making this argument, the Government appears to be looking to the bona fide purchaser provisions Subsection (L). However, that subsection, which allows bona fide purchasers to successfully assert their interest

in forfeitable property, only references Subsection (c) transfers of traceable assets to a third party.

Under the Court's reading, a pre-trial injunction under Subsection (m) would be inappropriate even if the assets were a direct gift from Billman to the respondent. In such a case, they would be hers to do with as she wished. In no sense would they still satisfy the definition of "substitute assets" because they would no longer belong to the RICO defendant. The Court recognizes that the line between receiving a gift and holding assets still belonging to another can be thin at best. Nonetheless, such distinctions appear to be necessary where the Government is attempting to prevent individuals not charged with RICO violations from the use of money or other property in their lawful possession.

The Court must now apply the legal analysis just offered to the evidence presented at the hearing held on February 14, 1990. The Court starts this analysis with the simple fact that none of the assets in question are currently held in the name of Billman, a RICO defendant. Rather, because the assets are in respondent's name, the Court begins by drawing the logical inference, which the Government appears to concede, that they currently belong to her. The Government's evidence cannot overcome this hurdle in its attempt to establish that respondent's access to the assets should be enjoined.

The Government's evidence consisted of testimony by United States Postal Inspector David P. Cyr, and audio tapes made pursuant to court-authorized interceptions of respondent's wire communications with Billman and her parents. This evidence concerned two categories of transfers to bank accounts held either by respondent alone, or jointly between her and one of her parents. The first involves a single wire transfer of $499,935.89 on

May 17, 1989 to an account with Comerica Bank, held jointly by respondent and her mother. The proceeds from this transfer were subsequently distributed among accounts and certificates of deposit at a number of different financial institutions which the Government now seeks to freeze. The second category involves four checks, each in the amount of $6,250 made out to respondent by a William McKnew.

With regard to the May 17, 1989 wire transfer, the Government introduced evidence that the transfer, which originated from Barclay's Bank in London, was arranged by Michael Byrd, Billman's English solicitor. The Government also introduced taped telephone conversations between respondent and Billman indicating that the wire transfer had taken place at Billman's direction. The parties are in sharp dispute as to whether respondent was in some way legally entitled to these funds. However, as the Court stressed earlier, the pivotal questions are whether the evidence established either 1) a direct link between the subject assets and Billman's RICO violation proceeds; or 2) that the assets actually continued to belong to Billman even after the wire transfer. Neither of these two issues appears to involve a factual dispute between the parties.

As to the first question, the Court finds that the evidence simply fails to establish any direct link to the $22 million in RICO violation proceeds which Billman allegedly transferred to Swiss bank accounts in 1985 and 1986. The Postal Inspector Cyr candidly conceded that there was no evidence as to what happened to those RICO proceeds from 1986 through the date of the wire transfer in question in May of 1989. Given the fact that Billman appears to have had sources of income completely unrelated to his alleged criminal activities, the Court is unable to find that the proceeds of the May

17, 1989 transfer may be directly linked to his RICO violations, and thus frozen through 1963(c).

Moreover, the Court finds it unnecessary to determine whether Subsection (m) authorizes pre-trial injunctions as to substitute assets because the evidence of record fails to establish that respondent was merely holding funds which, in reality, still belonged to Billman. In fact, the audio tape of a phone conversation between Billman and respondent on May 19, 1989, just days after the wire transfer, suggests quite forcefully that the money was respondent's to do with as she pleased.

This conversation clearly indicates that Billman was no longer claiming control over the transferred funds. Whether respondent had earned them in some way, or had simply received them from Billman as a gift, is completely irrelevant, since Subsection (m), at most, authorizes injunctions as to Billman's property. Because the Government's evidence fails to persuade the Court that the money still belonged to Billman after the wire transfer, Subsection (m) could not possibly provide a basis for the injunction sought in this case.

As to the checks made out to respondent by William McKnew, the Court found the evidence far more tenuous even on the issue whether they actually represented payment of funds to respondent by Billman. However, for the reasons stated above, even if the Court were to so find, they would not now be subject to an injunction unless they were directly traceable to the RICO proceeds, or were, in reality, merely being held by respondent for Billman's use. The Court is simply unable to make either of these findings based on the evidence before it. Accordingly, neither possible statutory mechanism justifies an injunction of those assets.

So, for all the foregoing reasons, the Court will deny the Government's Motion and Renewed Motion for an

Injunction Pursuant to 18 United States Code, Section 1963(d)(1)(B), Papers 3 and 13. And the Court will grant respondent's Motion Paper 10 insofar as it seeks dismissal of the injunctive relief proceeding.

I will enter a formal order in accordance with this oral opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 9, 1990

No. 90-7029

In Re: ASSETS OF TOM J. BILLMAN

Petitioner

UNITED STATES OF AMERICA

Petitioner - Appellant

v.

BARBARA A. MCKINNEY; ROBERT BUDJAC; ROSELYN BUDJAC

Respondents - Appellees

On Petitioner for Rehearing with Suggestion for Rehearing In Banc

---

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petitioner for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner with the concurrence of Justice Powell and Judge Hall.

For the Court

John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 3, 1990

No. 90-7029

In Re: ASSETS OF TOM J. BILLMAN,

Petitioner,

UNITED STATES OF AMERICA,

Petitioner - Appellant,

v.

BARBARA A. MCKINNEY; ROBERT BUDJAC; ROSELYN BUDJAC,

Respondents - Appellees.

M A N D A T E

The judgment of this court dated 10/3/90 takes effect today.

JOHN M. GREACEN
CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE:	• Docket No. B-89-2310
ASSETS OF TOM J. BILLMAN	•
BARBARA MCKINNEY	•
Respondent	•
• • • • • • • • • •	•

ORDER

Presently pending in the above-captioned case are the Government's Motion and Renewed Motion for an Injunction Pursuant to 18 United States Code Section 1963(d)(1)(B) (Papers 3 and 13), and respondent's Motion to Vacate Temporary Restraining Order and to Dismiss Petition for Preliminary Injunction (Paper 10). The issues raised by the motions were briefed, and the Court held an evidentiary hearing on February 14, 1990. After supplemental briefing, the Court had the benefit of oral argument at a hearing held on February 26, 1990.

In accordance with the Court's oral opinion and rulings rendered in open court at the conclusion of the hearing, IT IS, this 27th day of February, 1990, by the United States District Court for the District of Maryland,

ORDERED:

(1) That the Government's Motion and Renewed Motion for an Injunction Pursuant to 18 United States Code Section 1963(d)(1)(B) (Papers 3 and 13), BE, and the same hereby ARE, DENIED;

(2) That respondent's Motion to Vacate Temporary Restraining Order and to Dismiss Petition for Preliminary Injunction (Paper 10), BE, and the same hereby IS, GRANTED;

(3) That the Temporary Restraining Order currently in effect shall expire at 11:59 p.m. on February 28, 1990;

(4) That this case BE, and the same hereby IS, DISMISSED; and

(5) That the Clerk shall mail a copy of this Order forthwith to counsel of record.

Walter E. Black, Jr.
United States District Judge

APPENDIX F

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

UNITED STATES CONSTITUTION, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX H

The Current Provisions of § 1963

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both.,[1] and shall forfeit to the United States, irrespective of any provision of State law --

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any --

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection.

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[1] So in original. Amendment by Pub.L. 100-690 produced both a period and a comma.

In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

* * *

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section --

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that --

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order

will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property; if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

* * *

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and

cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that --

(A) the petitioner has a legal right, title, or interest in the property, and such right, title or interest renders the order of forfeiture invalid in whole or in part because the right, title or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant --

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

APPENDIX I

Original Version of § 1963 as Enacted in 1970.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for

violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE:	*	Docket No. B-89-2310
	*	
ASSETS OF TOM J. BILLMAN	*	
	*	
	*	101 W. Lombard Street
BARBARA MCKINNEY	*	Baltimore, MD 21201
	*	February 14, 1990
Respondent	*	
	*	
* * * * * * * * * *	*	

EXCERPTS OF HEARING
BEFORE DISTRICT COURT

MR. LOWELL: I noticed that your testimony was that money was transferred to Ms. McKinney to a bank in the United States from a bank called Barclay's in England, correct.

MR. CYR: Yes.

MR. LOWELL: It is a fact, isn't it, that there is not a shred of evidence that says that the money that came from Barclay came from any of the accounts that you list on Exhibit No. 26, is there?

MR. CYR: There is none.

MR. LOWELL: What did Mr. Billman, to your knowledge, do for a living in 1986, seven, eight, or nine, Mr. Cyr?

MR. CYR: Well, in '86, '87 he headed up Crysopt Corporation.

MR. LOWELL: And other corporations, right?

MR. CYR: Other corporations, yes.

MR. LOWELL: And how about '88 and '89?

MR. CYR: In '88, the later part -- well, during a substantial part of 1988, he was a defendant in the civil suit *MDIF v. Billman, et al.* In the later part of 1988, he seemed to have taken leave of the Washington area and traveled throughout the United States. I don't know that he was gainfully employed at that time.

* * *

MS. MCDONALD: I wanted to point out to the Court that the parties agree that the standard under which we have to demonstrate that the funds belong to Mr. Billman is probable cause. Now, there is a misstatement, I think, in the memorandum in which Ms. McKinney's attorney tries to draw a distinction between probable cause and preponderance of the evidence for probable cause means simply means more likely than not. I think it is very clear that this money, more likely than not, comes from Mr. Billman to Ms. McKinney.

I think that the Court also should consider the surreptitious nature of the manner in which the transfers were made and the telephone conversations were held and should disregard the argument that because there is no specific mention from Mr. Billman that I am transferring you this money out of this bank account of mine that the money did not originate with him.

On the legal side, I think that the issue for the Court to consider is whether or not there is authority under the RICO statute for the Court to enter a pre-trial restraining order of a defendant's assets when the Government cannot establish that they are proceeds of the offense.

THE COURT: Not a defendant's assets, a third party's assets.

MS. MCDONALD: Well, Your Honor, clearly Mr. Billman is the source of these assets.

• • •

Q. I was going to get to that with you. It is a fact, isn't it, that in that one conversation he talked that he was doing some kind of consulting on real estate, right?

A. That is what I am referring to, yes.

Q. And it is not -- well, I don't want to start inference but it is not impossible that for consulting work he would be paid, right?

A. Certainly.

Q. In the period of time about which we are talking of funds being transferred to Europe in 1985 through, according to your exhibit, 1986, it is a fact, is it not, that Mr. Billman had corporations, entities, and business projects which you have not alleged in your affidavit nor are alleged in the indictment to be involved in any of the RICO enterprises, correct?

A. That is correct.

Q. One, for example, is EPIC Realty, correct?

A. Right.

Q. Another is a company called First Investors, correct?

A. Yes.

Q. You are aware, are you not, Mr. Cyr, that in this period of time, those two entities alone were involved in transactions which resulted in some millions, I mean millions, two or three millions of dollars being passed to Mr. Billman, correct?

A. Yes, he received dividends from those companies.

Q. And neither of those companies as we have established are involved in the RICO enterprise, correct, at least according to the allegations that you have made?

A. That's correct.

Q. In your direct testimony, you indicated as to the trip Ms. McKinney was going to make to Detroit that that was talked about in the conversation that she had with Mr. Billman, right?

A. Yes.
Q. It was also talked about during that same conversation that that weekend was her birthday, correct?
A. That is correct.
Q. And her parents live in Detroit where she went, correct?
A. Yes, they do.

* * *

MS. MCDONALD: Your Honor, first of all, I think there are two major issues for the Court to resolve. The first one is a factual issue, and that is whether or not Tom Billman was the source of the funds that were transferred to Ms. McKinney. The standard under which the Court operates is probable cause.

THE COURT: You don't take the position that the funds were Mr. Billman's. You're saying he was the source. Do you contest that the money was indeed Ms. McKinney's?

MS. MCDONALD: No, Your Honor. The money came from Mr. Billman.

THE COURT: Yes.

MS. MCDONALD: That is the contention that I think the Court needs to resolve. Ms. McKinney's attorney has argued that Mr. Billman was not the source of those funds.

THE COURT: Oh, I understand that.

MS. MCDONALD: That they could be from some unnamed, unknown, third party. I think on the evidence which has been presented to the Court, the Government has more than proved that Tom Billman was the source of those funds, that the funds were his, and that they were transferred to Ms. McKinney.

* * *

MS. MCDONALD: I think it is apparent that he intended to make a gift. But what we are saying, Your

Honor, is that a RICO defendant who hides all of his assets overseas, cannot successfully laundry them and repatriate them to the benefit of co-conspirators. And the Court need not reach the issue of what would happen if this money were transferred for value to an innocent third party.

THE COURT: Let's assume, for the moment, just so I can get this in focus a moment on what the law is. Suppose, hypothetically, that Mr. Billman's grandmother had died and he got a legacy from her. And he turned that over the very next day to Ms. McKinney. Is there any issue of a bona fide purchaser in getting grandmother's inheritance?

MS. MCDONALD: Well, if it is Mr. Billman's asset at the time he inherits it, it is certainly subject to a restraining order because he has transferred all of his assets outside of the United States.

THE COURT: So the minute he gets a dollar, it's dirty money, it comes under (a), and you can grab it in the hands of any third party, obviously, a third party who you allege is not a bona fide receiver.

MS. MCDONALD: Yes, sir. Because, otherwise, Your Honor --

THE COURT: Well, it all really rests on those two cases which I have to go back and read right now.

• • •

MR. LOWELL: I think when you review the transcripts, for example, when the Government swears in an affidavit that the money being transferred is a "gift" from Mr. Billman to Ms. McKinney, you won't find any evidence in the record indicating that it is a "gift". Indeed, the only evidence the record will show was that Ms. McKinney was entitled to that money for any number of reasons including a legally binding indemnification agreement that she has as an officer of parent company. Okay, that would be one. Two, when

they say that Ms. McKinney was -- when the money -- I think the phrase is that Mr. Billman transferred the money to Ms. McKinney. There's not a shred of evidence, not even an inference that you will be able to get that he "transferred" the money.

Supreme Court, U.S.
FILED
MAY 10 1991
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No. 90-1420

In the Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA A. MCKINNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in a criminal RICO prosecution in which the government seeks forfeiture from a fugitive defendant who transferred the forfeitable proceeds under 18 U.S.C. 1963(a) out of the country, a district court may issue a pretrial order restraining substitute assets of the defendant that he transferred to a non-RICO co-defendant in the United States.

2. Whether the pretrial restraint of the fugitive RICO defendant's substitute assets transferred to a non-RICO defendant violates the non-RICO defendant's Sixth Amendment right to counsel.

3. Whether the pretrial restraint of the fugitive RICO defendant's substitute assets violates due process.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 915 F.2d 916.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1990. A petition for rehearing was denied on November 9, 1990. Pet. App. 29a-30a. On January 24, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 9, 1991 (a Saturday), and the petition was filed on March 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 15, 1989, the United States District Court for the District of Maryland entered a temporary restraining order pursuant to 18 U.S.C. 1963(d)(2) restraining petitioners from spending funds transferred to them by Tom J. Billman, a fugitive. The temporary restraining order was continued in effect by consent of the parties until January 25, 1990, when petitioner McKinney challenged its validity. In the meantime, on December 1, 1989, a federal grand jury in the District of Maryland returned an indictment charging Billman with conspiring to commit mail fraud and wire fraud, in violation of 18 U.S.C. 371; with three substantive counts of mail fraud, in violation of 18 U.S.C. 1341; with 15 substantive counts of wire fraud, in violation of 18 U.S.C. 1343; and with participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c). Petitioner McKinney was charged in the indictment with conspiracy to commit mail and wire fraud, three counts of mail fraud, and ten counts of wire fraud. The indictment also sought forfeiture of $28 million against Billman and $14 million against co-defendant Crysopt Corporation as RICO proceeds pursuant to 18 U.S.C. 1963(a)(1) and (3). Following an evidentiary hearing, the district court declined to enter a post-indictment injunction against petitioners pursuant to 18 U.S.C. 1963(d)(1)(A), vacated the temporary restraining order, and dismissed the case. Pet. App. 14a-28a, 32a-33a. The court of appeals reversed and remanded for entry of an appropriate injunction. Pet. App. 1a-13a.

1. Billman and co-defendant Clayton C. McCuiston owned EPIC Holdings, Ltd., a holding company that controlled Community Savings and Loan in Bethesda,

Maryland. Petitioner McKinney was a vice-president and director of the holding company. The indictment charged that Billman, McCuiston, and McKinney used their positions at Community Savings and Loan and its holding company to defraud depositors by siphoning money away from its operations between April 1984 and February 1986. Part of the proceeds of the fraud were paid over to Billman and McCuiston through a holding company dividend of $14 million in January 1985. Shortly thereafter, Billman and McCuiston funded Crysopt Corporation with an additional $14 million in cash. Billman was the president, chairman of the board, and sole shareholder of Crysopt; McKinney was an officer and director of the company. Pet. App. 2a; Gov't C.A. Br. 4-5.

The indictment alleged that Billman, petitioner McKinney, and Crysopt began transferring proceeds of the fraudulent scheme to Swiss bank accounts in July 1985 for the purpose of concealing their ill-gotten gains. It specifically alleged that Billman, McKinney and Crysopt made two separate transfers of $4 million to such accounts in August 1985. The indictment further alleged that Billman transferred a total of more than $22 million in fraudulent proceeds to Swiss bank accounts. Pet. App. 2a; Gov't C.A. Br. 5.

Petitioner McKinney, Billman, McCuiston, and Crysopt Corporation were indicted for mail fraud, wire fraud, and conspiring to commit those offenses during their operation of Community Savings and Loan. Billman and Crysopt -- but not petitioner McKinney -- were separately charged with RICO violations arising from the same events. The indictment sought forfeiture of $28 million against Billman and $14 million against co-defendant Crysopt Corporation as RICO proceeds pursuant to 18 U.S.C. 1963(a)(1) and (3). Pet. App. 2a; Gov't C.A. Br. 2.

Before the indictment was returned, Billman fled the country. He remains a fugitive. Pet. App. 2a; Gov't C.A. Br. 5-6.[1]

2. The temporary restraining order, which was entered before the indictment was returned, prohibited petitioner McKinney and her parents, petitioners Robert and Roselyn Budjac, from spending funds transferred to them by Billman. The funds named in the order included the proceeds of a wire transfer of $499,935.89 from Billman to McKinney as well as other payments totaling $50,000 that had been made or were to be made to McKinney by William McKnew at Billman's direction. C.A. App. 5-7. When McKinney later challenged the validity of the temporary restraining order after the indictment was returned, the government moved for entry of an injunction pursuant to 18 U.S.C. 1963(d)(1)(A). Gov't C.A. Br. 2-3.

a. The evidence at the evidentiary hearing showed that Barclays Bank of London, England, transferred $499,935.89 to an account held by petitioner McKinney and her mother, petitioner Roselyn Budjac, at Comerica Bank in Detroit, Michigan, on May 17, 1989. Two days later, McKinney's mother withdrew $500,368.81 and closed the account. The money was subsequently deposited in other accounts and placed in certificates of deposit at Comerica Bank and another bank. McKinney also gave her parents $35,480. Pet. App. 2a-4a; Gov't C.A. Br. 7, 9-10.

At the evidentiary hearing, the government introduced tape-recorded telephone conversations demonstrating that

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[1] A state court placed Community Savings and Loan in receivership in 1985 when it was unable to return funds to its depositors. Billman disappeared in October 1988 after a civil jury awarded the Maryland Deposit Insurance Fund $112 million against Billman, McCuiston, and Crysopt and nearly $102 million against petitioner McKinney for the losses sustained by Community Savings and Loan. Gov't C.A. Br. 5-6.

Billman was the source of the $499,935.89 transferred to McKinney and her mother. Eight days before the transfer, McKinney received an overseas call from Michael Byrd, a London solicitor, who informed her that he and she had a "mutual client."[2] Byrd explained that he would transfer some money to her as soon as he received the funds. The day after the wire transfer, McKinney received a brief telephone call from Billman, who stated his understanding that "the eagle has flown and landed on your end. Is that correct?" Pet. App. 3a. McKinney responded that she had not heard, and she and Billman arranged in code to discuss the matter on a different telephone the following day. When Billman called McKinney the next day, he asked: "Did you get the money?" *Ibid.* After McKinney confirmed that she had received it, Billman apologized for taking so long to effect the wire transfer. During that conversation, McKinney and Billman spoke at length about the wire transfer, and they discussed how McKinney would use the money. Billman also asked "[i]s McKnew still paying you?" and McKinney acknowledged that he was. *Id.* at 4a. See *id.* at 2a-4a; Gov't C.A. Br. 6-10.

b. The proof at the evidentiary hearing also showed that William C. McKnew was making regular payments of $6,250 to McKinney to repay a debt that he owed to Billman. The debt arose out of a business transaction among Billman, McKnew, and Europlan Holdings, Ltd. After Billman introduced Michael Dee, a director of Europlan, to McKnew, Europlan invested $80,000 in the stock of McKnew's business with the option of reselling the shares to Billman in three years at Europlan's cost. Billman later repurchased Europlan's stock in McKnew's business, but he requested that the shares remain registered in Europlan's name.

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[2] During the investigation, Byrd told an agent from New Scotland Yard that Billman was his client. Pet. App. 2a-3a.

Billman subsequently sold the stock back to McKnew for $80,000, and he directed Dee to transfer the shares in exchange for McKnew's promissory note. In April 1989, however, Billman and McKnew renegotiated the terms of the sale to have McKnew make eight monthly payments of $6,250 to McKinney for a total payment of $50,000 for the stock. When Billman told Dee to substitute McKinney for him on the debt, Dee thought the transaction was very strange since Billman would lose a considerable amount of money. McKnew had made four payments to McKinney at the time the temporary restraining order was entered. Pet. App. 4a-5a; Gov't C.A. Br. 10-11.

3. The district court held that 18 U.S.C. 1963 does not authorize a pretrial injunction against a third party to restrain assets transferred from a RICO defendant unless the government proves that the transferred assets were proceeds of the RICO offense. It also ruled that 18 U.S.C. 1963 does not authorize a pretrial injunction restraining substitute assets of a RICO defendant transferred to a third party. The court found that the government had not proved that the funds transferred to petitioner McKinney were part of the proceeds of the RICO offense alleged in the indictment. It also found that the funds belonged to McKinney after they were transferred to her. The district court therefore declined to enter a pretrial injunction against petitioners, vacated the temporary restraining order, and dismissed the case. Pet. App. 14a-28a, 32a-33a.

4. The court of appeals unanimously reversed and remanded for entry of an appropriate injunction. Pet. App. 1a-13a.[3] It noted that "[t]here can be no doubt that Billman was the source of the funds sent to [petitioner] McKinney

[3] Petitioners' reproduction of the court of appeals' decision in their appendix does not identify the panel members. They were Justice Powell, sitting by designation, Senior Judge Butzner, and Judge Hall.

through his solicitor and through the Europlan transaction." *Id.* at 6a-7a.[4] The court accepted, however, the district court's factual findings and assumed that "the source of the funds was money that Billman did not steal from Community [Savings and Loan]." *Id.* at 7a. The court concluded that 18 U.S.C. 1963 nevertheless authorizes the pretrial restraint of substitute assets of a RICO defendant transferred to a third party when the RICO defendant places the racketeering proceeds from the RICO offense beyond the jurisdiction of the district court. Pet. App. 7a-10a. The court thus held that "the pretrial restraining provisions of [18 U.S.C. 1963] do not permit a defendant to thwart the operation of the forfeiture laws by absconding with RICO proceeds and then transferring his substitute assets to a third person who does not qualify as a bona fide purchaser for value." *Id.* at 11a.

The court of appeals rejected petitioner McKinney's claim that the pretrial restraint of the transferred funds violated her Sixth Amendment right to counsel by depriving her of funds to retain counsel of her choice. Pet. App. 11a-12a. The court also rejected petitioner's claim that the pretrial restraint of the transferred funds for an indefinite period of time denies her due process. *Id.* at 12a-13a.

ARGUMENT

1. Petitioners contend that 18 U.S.C. 1963 does not authorize a pretrial injunction restraining assets transferred to a third party unless the government proves that the assets are directly traceable to the racketeering proceeds of a RICO offense. Pet. 12-16. Because this issue is one of first

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[4] Petitioners therefore err in claiming that the government "could not establish that Billman had ever owned the funds or had transferred them to McKinney." Pet. 8. See also Pet. 16.

impression and because the court of appeals correctly resolved it, review by this Court is unwarranted.

a. The court of appeals correctly held that the substitute assets of a RICO defendant transferred to a third party are subject to forfeiture when the RICO defendant has placed the racketeering proceeds from the RICO offense beyond the jurisdiction of the district court. Pet. App. 7a-9a. Sections 1963(a)(1) and (3) provide that the racketeering proceeds of a RICO offense shall be forfeited to the United States.[5] If a RICO defendant places the forfeitable proceeds beyond the jurisdiction of the district court, Section 1963(m)(3) requires the court to order the forfeiture of any other property of the defendant up to the value of the removed property.[6] Since the indictment in this case alleges

[5] Section 1963(a) provides in part:

> Whoever violates any provision of section 1962 of this chapter • • • shall forfeit to the United States, irrespective of any provision of State law –
>
> (1) any interest the person has acquired or maintained in violation of section 1962;
>
> • • • • •
>
> (3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

[6] Section 1963(m) provides:

> If any of the property described in subsection (a), as a result of any act or omission of the defendant –
>
> (1) cannot be located upon the exercise of due diligence;
>
> (2) has been transferred or sold to, or deposited with, a third party;
>
> (3) has been placed beyond the jurisdiction of the court;
>
> (4) has been substantially diminished in value; or
>
> (5) has been commingled with other property which cannot be divided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

that Billman has placed the racketeering proceeds beyond the juridiction of the district court, Section 1963(m) authorizes the forfeiture of his substitute assets. Moreover, Section 1963(c) provides that any forfeitable property transferred to a third party shall be forfeited unless the transferee establishes that he was a bona fide purchaser for value of the property. Consequently, the substitute assets that Billman transferred to petitioner McKinney are subject to forfeiture unless McKinney establishes that she qualifies as a bona fide purchaser for value.

Contrary to petitioners' contention, Pet. 12-15, the court of appeals' conclusion that forfeitable substitute assets of a RICO defendant are subject to pretrial restraint under Section 1963 is consistent with the text of the RICO Act. Section 1963(d)(1)(A) authorizes a district court to enter a restraining order or an injunction, to require the execution of a satisfactory performance bond, and to take any other action to preserve the availability of "property described in subsection (a)" that, in the event of a conviction, is subject to forfeiture.[7] Substitute assets become subject to forfeiture under subsection (m) when "the property described in subsection (a)" is no longer available for forfeiture.[8] For

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[7] Section 1963(d)(1)(A) provides:

> (d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--
>
> (A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section[.]

[8] Petitioners mistakenly assert, Pet. 4-5, that the pretrial restraint provision of subsection (d)(1)(A) and the substitute asset provision of

that reason, the court of appeals properly concluded that "when, as here, the defendant has placed the assets specified in subsection (a) beyond the jurisdiction of the court, subsection (d)(1)(A) must be read in conjunction with subsection (m) to preserve the availability of substitute assets pending trial." Pet. App. 9a.

That interpretation of the RICO statute is a sensible one. In analyzing the reach of the analogous provision in 21 U.S.C. 853(e)(1)(A) in *United States* v. *Monsanto*, 491 U.S. 600, 613 (1989) (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 204 (1983)), this Court emphasized that "[t]he sole purpose of [the] restraining order provision * * * is to preserve the status quo, *i.e.*, to assure the availability of the property pending disposition of the criminal case." When a RICO defendant has already placed the forfeitable racketeering proceeds beyond the jurisdiction of the court, preventing pretrial restraint of substitute assets under subsection (m) would clearly defeat the remedial purpose of the statute: to preserve the availability of assets subject to forfeiture. Thus, the Fourth Circuit correctly determined that "§ 1963(d)(1)(A) should be construed to authorize the pretrial restraint of those assets specified by subsections (a) and (m) that can be forfeited after conviction." Pet. App. 10a.

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subsection (m) were enacted together in the Comprehensive Crime Control Act of 1984. Although a substitute asset provision similar to the current subsection (m) was included in the amendments to Section 1963 in the Comprehensive Crime Control Act of 1984, that provision was repealed in a later section of the same Act. See Pub. L. No. 98-473, Tit. II, §§ 302, 2301(b), 98 Stat. 2040-2041, 2192 (1984). Subsection (m) was enacted two years later as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. XI, § 1153(a), 100 Stat. 3207-3213, as amended by Pub. L. No. 99-646, § 23, 100 Stat. 3597 (1986) and Pub. L. No. 100-690, Tit. VII, § 7034, 102 Stat. 4398 (1988).

The court of appeals' decision does not permit the pretrial restraint of a third party's assets without any showing that the assets once belonged to or were controlled by the RICO defendant, as petitioner contends. Pet. 15-16. By its terms, Section 1963(m) authorizes the forfeiture of "any other property of the defendant" when the racketeering proceeds are unavailable for forfeiture as a result of any act or omission of the defendant. To be sure, the district court found that the funds transferred to petitioner McKinney were not racketeering proceeds and that the funds belonged to McKinney after they were transferred to her. Pet. App. 25a-27a. The district court, however, made no specific finding that the funds did not belong to Billman before they were transferred to McKinney. To the contrary, the district court's ruling rested on the implicit finding that Billman was the source of the funds. And as the court of appeals noted, the evidence introduced at the hearing leaves "no doubt that Billman was the source of the funds sent to [petitioner] McKinney through his solicitor and through the Europlan transaction." *Id.* at 6a-7a.[9]

b. There is no merit in petitioners' contention, Pet. 17-19, that the decision below will have a substantial and detrimental impact on legitimate commercial transactions. In the first place, that contention incorrectly equates any transfer of untainted assets (as opposed to the forfeitable racketeering proceeds) by a RICO defendant to a third party with a legitimate business transaction. Under Section 1963(m), however, a RICO defendant's untainted substitute assets are subject to forfeiture when he attempts to avoid the forfeiture of racketeering proceeds by removing or concealing them. That provision was designed to address "one

[9] Indeed, as the court of appeals noted, the evidence at the hearing justified the inference that the funds transferred to McKinney were actually part of the racketeering proceeds that had been deposited in Swiss banks. Pet. App. 7a.

of the most serious impediments to significant criminal forfeitures." S. Rep. No. 225, *supra*, at 201.[10] When a RICO defendant transfers forfeitable assets to a third party, Section 1963(c) protects the transferee if he can establish that he was "a bona fide purchaser for value of such property who at the time of the purchase was reasonably without cause to believe that the property was subject to forfeiture under this section." The legitimacy of a third-party transaction therefore turns on whether the transferee had reason to believe that the transferred assets were forfeitable, rather than on whether the particular assets were tainted. Petitioner's claim thus vastly overstates the impact that the decision below will have on commercial transactions involving innocent third parties.

In any event, to the extent that the pretrial restraint of a RICO defendant's substitute assets may in some cases disrupt legitimate business transactions, that is not the case here.[11] Petitioner McKinney was not an innocent third party engaged in a legitimate business transaction with Billman. On the contrary, the indictment specifically charged that McKinney aided Billman in concealing the forfeitable racketeering proceeds in Swiss banks. And as the court of appeals noted, McKinney "presented insufficient evidence to show that she qualifies as a bona fide purchaser for value without cause to believe that the substitute assets in her hands [transferred by Billman] were subject to forfeiture."

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[10] The Senate Report noted that the provision "should be particularly helpful in combatting the problem of use of offshore banks as safe havens for crime-related assets." S. Rep. No. 225, *supra*, at 201 n.31.

[11] The Department of Justice recently adopted internal guidelines limiting the use of pretrial restraints in order to minimize their impact on innocent third parties and a defendant's legitimate business activities. See United States Attorneys' Manual § 9-110.414 (blue sheet issued June 30, 1989).

Pet. App. 8a. Accordingly, petitioner's claim does not warrant further review.

c. There is also no merit in petitioners' contention, Pet. 19-22, that the decision below conflicts with *United States* v. *Regan*, 858 F.2d 115 (2d Cir. 1988). In *Regan*, the Second Circuit upheld a pretrial restraint on the business operations of a third-party partnership of which five of the six RICO defendants were partners. Contrary to petitioner's contention, Pet. 21, the Second Circuit did not rule that restraining orders may be used only to preserve racketeering proceeds for their ultimate forfeiture. On the contrary, *Regan* squarely held that Section 1963(d)(1)(A) authorized the district court to impose pretrial restraints on all of the assets of the third party partnership—and not just the forfeitable partnership interests of the defendants—in order to prevent dissipation of the defendants' partnership interests. 858 F.2d at 119-121. The court remanded the case, however, for a determination whether other, less burdensome restraints were available to serve the government's interest in preserving assets equivalent to the value of the defendants' partnership interests for forfeiture. *Id.* at 121-122. Significantly, the court in *Regan* concluded that the district court could, as an alternative, restrain substitute assets of the individual defendants under Section 1963(m)(5) equal in value to that of the defendants' partnership interests. 858 F.2d at 121.[12] That conclusion is consistent with the Fourth Circuit's ruling here that forfeitable substitute assets of a RICO defendant are subject to pretrial restraint under 18 U.S.C. 1963(d)(1)(A). The Second Circuit in *Regan*, however, did not address the issue whether such forfeitable

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[12] The substitute asset provision was Section 1963(n) when the Second Circuit decided *Regan*. It was subsequently redesignated as subsection (m). See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7034(b), 102 Stat. 4398.

substitute assets that have been transferred to a third party are subject to pretrial restraint. Accordingly, there is no conflict between *Regan* and the court of appeals' decision in this case.[13]

2. Petitioner McKinney contends that the pretrial restraint of the transferred funds violates her Sixth Amendment right to counsel by depriving her of funds to retain counsel of her choice. That claim lacks merit.

In *Caplin & Drysdal, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, *supra*, this Court held that the pretrial restraint of a defendant's forfeitable assets does not violate the Sixth Amendment, even if the restraint deprives her of funds to hire the attorney of her choice. In *Caplin & Drysdale*, the Court explained that "[t]he [Sixth] Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by courts." 491 U.S. at 624. The Court went on to note that "[t]he forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." *Id.* at 625. In *Monsanto*, the Court concluded that "assets in a defendant's possession [that he plans to use to retain an attorney] may be restrained [pending trial] • • • based on a finding of probable cause to believe that the assets are forfeitable." 491 U.S. at 615 (footnote omitted).

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[13] As petitioner notes, Pet. 19 n.14, the court of appeals indicated that its decision was inconsistent with the district court's decision in *United States* v. *Chinn*, 687 F. Supp. 125 (S.D.N.Y. 1988). The reasoning of the *Chinn* decision, however, has not been adopted by any court of appeals. Consequently, any conflict between that decision and the one here does not warrant further review. None of the other cases cited by petitioner, Pet. 19-20, addressed the issue in this case.

Contrary to petitioner's contention, this Court's decisions in *Caplin & Drysdale* and *Monsanto* are controlling here. The grand jury's indictment established probable cause to believe that Billman derived forfeitable racketeering proceeds from the RICO offense. Cf. *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975).[14] The indictment likewise established probable cause to believe that Billman and petitioner McKinney have placed those forfeitable proceeds beyond the jurisdiction of the district court by depositing them in Swiss banks. The proof at the evidentiary hearing established that Billman is the source of the restrained funds transferred to McKinney. Thus, as the court of appeals explained, "[t]he funds in issue are not nonforfeitable assets" of petitioner McKinney because "[t]hey are Billman's substitute assets, which § 1963(m) subjects to forfeiture." Pet. App. 11a-12a. Accordingly, the pretrial restraint of those funds does not deprive petitioner McKinney of her Sixth Amendment right to counsel.

There is no merit to petitioners' claim that the decision below conflicts with the Eleventh Circuit's decision in *United States* v. *Bissell*, 866 F.2d 1343, cert. denied, 493 U.S. 849 (1989). Petitioners have submerged in ellipses a critical phrase from the quotation they cite from *Bissell*. What the Eleventh Circuit actually wrote in *Bissell* was "[i]f the defendant proves at trial or in a collateral proceeding that prosecutors, *acting in bad faith*, restrained assets which they knew or should have known to have no connection with criminal activity, a conviction would be in jeopardy due to a denial of the Sixth Amendment right to counsel of their choice." 866 F.2d at 1355 (emphasis added). Indeed, the

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[14] The Senate Report on the pretrial restraint provision noted that "probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order." S. Rep. No. 225, *supra*, at 202.

entire relevant section of *Bissell* discusses the potential for prosecutorial abuse. See *id.* at 1354-1355. *Bissell* did not address the issue in this case; it did not hold that a pretrial restraint like this one violates the Sixth Amendment; the money at issue in this case is forfeitable; and petitioners do not allege that the government is acting in bad faith. *Bissell* is inapposite.

3. Petitioners contend that the pretrial restraint of the transferred funds denies them due process. That claim, too, is meritless.

Petitioners' first due process claim is merely a variation of their Sixth Amendment claim. They argue that the court of appeals' decision raises serious constitutional questions because it permits the pretrial restraint of funds belonging to a third party without a finding of probable cause to believe that the funds are connected to criminal activity. Pet. 24. In *United States* v. *Monsanto*, this Court reaffirmed the principle that the government is permitted "to seize property based on a finding of probable cause to believe that the property will ultimately be proven forfeitable." 491 U.S. at 615. See also, *e.g.*, *United States* v. *$8,850*, 461 U.S. 555 (1983); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Here, as the court of appeals explained, "[t]he funds in issue * * * are Billman's substitute assets, which § 1963(m) subjects to forfeiture." Pet. App. 11a-12a. The pretrial restraint on the dissipation of those funds, therefore, does not violate the Due Process Clause.

Petitioners next argue that the pretrial restraint of the funds deprives them of due process by placing the funds beyond their control for an indefinite duration while Billman remains a fugitive. Pet. 24-25. In *United States* v. *$8,850*, 461 U.S. at 564-566, this Court held that the four factors set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), provide the appropriate framework for determining whether a delay in forfeiture proceedings violates the due process right to

be heard at a meaningful time. Those factors are the length of the delay, the reason for the delay, the defendant's assertion of her right, and the prejudice to the defendant. Here, as the court of appeals explained, the "[d]elay resulting from Billman's flight cannot be attributed to the government," because "McKinney aided him by assisting in the transfer of Community's funds abroad." Pet. App. 13a. Based on the evidence at the hearing, the court also noted that "[McKinney] presently sustains [Billman] as a fugitive by forwarding messages left for him on an answering device." *Ibid.* Under these circumstances, the court correctly concluded that "[McKinney] is in no position to complain about the government's inability to bring [Billman] to trial." *Ibid.*[15]

Finally, petitioners claim that the pretrial restraint provision of the RICO forfeiture statute is unconstitutionally vague because it lacks a reasonably clear standard for third parties to determine whether and when assets in a transaction are subject to restraint. Pet. 25-26. Petitioners did not raise that claim in the court of appeals, however, see Br. for Appellee 1, 15-40, and they may not assert it in this Court for the first time. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, petitioners' attack on the facial validity of 18 U.S.C. 1963(d)(1)(A) must fail. Section 1963 does not infringe First Amendment freedoms, so petitioners' challenge must be evaluated in light of the particular facts of their case. The relevant issue is whether they had fair notice that they would be subject to that Act. *United States* v. *Powell*, 423 U.S. 87, 92 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). If they did, they cannot complain that the Act could be unconstitu-

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[15] The government is still attempting to catch Billman. See Washington Post, Apr. 27, 1991, at B1, col. 2.

tionally vague when applied to others. *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). Given the nature of the transactions at issue here, petitioners cannot make that showing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

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In the Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA A. MCKINNEY; ROBERT BUDJAC; ROSELYN BUDJAC, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

*ABBE DAVID LOWELL
ROSS A. NABATOFF
MAX HATHAWAY
* *Counsel of Record*

Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:

GRAEME W. BUSH
ALBERT G. LAUBER, JR.
Caplin & Drysdale

EUGENE GRESSMAN
Seton Hall University School of Law

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REPLY BRIEF OF PETITIONER

This case presents an important issue concerning the interpretation of the RICO pre-trial restraint provisions: *viz.*, whether the Government may restrain *prior to trial* non-tainted assets legitimately owned by a third party. The Government minimizes the far-reaching implications of the Fourth Circuit's misapplication of that statute by asserting that McKinney's assets belong to Billman, the RICO defendant, and are restrainable as *his* substitute assets. The Government's brief misstates the record and relies on innuendo and material inaccuracies to support the Fourth Circuit's decision. The undisputed finding of the district court is that the assets are *not* Billman's.

Even if they were, their restraint contradicts the unambiguous language of the statute. Absent from the Government's brief is any argument to the contrary.

Three essential predicates underlie the Fourth Circuit's decision; one is factual, the other two are statutory. The factual assumption -- *viz.*, that Petitioners' funds once belonged to Billman and are now *his* substitute assets -- is false. The Fourth Circuit's restraint of Petitioners' funds also rests on two assumptions that squarely conflict with the plain and unambiguous language of the statute: *viz.*, that (1) the pre-trial restraint provision (Subsection (d)(1)(A)) and (2) the relation-back doctrine (Subsection (c)) apply to legitimate assets belonging to third parties. The latter assumption is critical to the Government's attempt to defend the Fourth Circuit's conclusion that the funds are *Billman's* substitute assets despite its conclusion that the funds belong to Petitioners.

1. The Government seriously misstates the record. The district court held a full evidentiary hearing to determine the propriety of a restraint. The Government acknowledged that there is not "a shred of evidence" connecting McKinney's funds to the alleged racketeering enterprise. It could not establish that Billman ever owned the funds. Indeed, the district court did not even find that Billman was either the source of, or transferred, the funds to McKinney.[1] Rather, the

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[1] The Government contends that "the district court's ruling rested on the implicit finding that Billman was the source of the funds." *Opposition* at 11. The Government does not provide a record citation in support of this contention. Nor can it. This contention is simply false. The district court's analysis was straightforward: *viz.*, the funds are not derived from the alleged racketeering enterprise and are not substitute assets of Billman. Those conclusions are consistent with Billman either being the source or not being the source of the

(continued...)

district court found that the funds now legitimately belong to McKinney. The Fourth Circuit accepted these findings. That is the record before the Court and the Government cannot -- as it has done here -- elect not to be bound by that record.

For example, to explain away the obvious due process problems presented by an indefinite (and potentially permanent) restraint of Petitioners' legitimate assets, the Government asserts that "[McKinney] *presently sustains* [Billman] as a fugitive by forwarding messages left for him on an answering device." *Opposition* at 17 (emphasis added). By this statement, the Government suggests that McKinney should not be heard to complain about the Government's inability to apprehend Billman and ultimately resolve the issues underlying the restraint of her assets. In essence, the Government appears to justify the restraint as a form of punishment.

This assertion is *false*. The indictment -- handed up on December 1, 1989 -- does not allege that McKinney ever sustained Billman as a fugitive. At the February 1990 evidentiary hearing, the Government neither alleged, nor attempted to prove, that McKinney had any sort of continuing (or incidental) contact with Billman.[2] The only evidence of record concerning any alleged contacts between Billman and McKinney relates to wiretaps of McKinney's phone in April and May of 1989.

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[1](...continued)
funds. The district court's holding, therefore, does not entail -- as a matter of logical inference -- that Billman was the source of the funds.

[2]If anything, discussions between McKinney and the U.S. Attorney's office between August and December of 1989 indicated that the Government was aware that McKinney had no contacts with Billman.

Those calls occurred nearly *two years ago*. For the Government now to assert that McKinney "*presently sustains* [Billman] as a fugitive" is outrageous and manifestly unfair.

Counsel for the Government relies upon the Fourth Circuit's conclusion in making its inaccurate statements about McKinney's current conduct. That is no excuse. The Fourth Circuit's conclusion was wrong. "[A]n appellate advocate has the luxury of time (and review by more experienced advocates). We do not expect to see misstatements of this character in briefs." *United States v. Green*, 786 F.2d 247, 254 (7th Cir. 1986) (Easterbrook, J.) Many of the Government's other statements about McKinney distract from the merits of the issues presented.[3] This misstatement does more. It purports to address the merits. As such, that statement misleads the Court on a material issue. "The principal coin of the United States Attorney [and counsel for the Government] is credibility. Some of that coin has been wasted in this case." *Id.*

Moreover, the Government claims that the district court "ruled that 18 U.S.C. 1963 does not authorize a

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[3]For example, the Government baldly asserts that "McKinney was not an innocent third party engaged in a legitimate business transaction with Billman." *Opposition* at 12. First, the district court did not find that McKinney was engaged in *any* transaction with Billman. Apparently, the Government intends for such statements to reflect poorly on McKinney's character. Similar misstatements pervade the Fourth Circuit's decision. For example, in denying McKinney's Sixth Amendment claim, the Fourth Circuit stated -- without factual support -- that McKinney had no legitimate entitlement to the funds. *Pet.App.* at 11a. The Fourth Circuit even suggested -- contrary to the undisputed findings of the district court -- that the hearing justified the inference that the funds transferred to McKinney were part of the racketeering proceeds. *Pet.App.* at 7a.

pretrial injunction restraining assets of a RICO defendant transferred to a third party." *Opposition* at 6. To the contrary, the district court ruled that the assets belong to McKinney and are *not* substitute assets of Billman. *Pet.App.* at 27a. The Government's mischaracterization of the district court's holding is important and obscures a central issue before the Court. The district court found that the funds "belong" to McKinney. The Government did not challenge that finding on appeal, and the Fourth Circuit affirmed it. Nevertheless, the Fourth Circuit held, and the Government now contends, that the funds are substitute assets *of Billman*.

The Government presumes that matters were adjudicated that in fact were never alleged by the Government or litigated by the parties. For example, the Government states that "McKinney presented insufficient evidence to show that she qualifies as a bona fide purchaser for value without cause to believe that the substitute assets in her hands [transferred by Billman] were subject to forfeiture."[4] *Opposition* at 12. Again, this statement incorrectly assumes that McKinney's assets belong to Billman and she is merely holding them for him. Equally important, it assumes that the district court conducted a bona fide purchaser hearing. The record unequivocally establishes that it did not.

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[4]The Government uncritically relies on the Fourth Circuit's conclusion in making this assertion. We discuss *supra* that such reliance is not an excuse for a misstatement. Indeed, if any inference can be drawn from the district court's finding that the funds belong to McKinney, it is that the transfer was legitimate. "The evidence of record fails to establish that [McKinney] was merely holding funds which in reality still belonged to Billman. In fact, the audio tape of a phone conversation * * * suggests quite forcefully that the money was [McKinney's] to do with as she pleased." *Pet.App.* at 27a.

The Government compounds this misstatement by asserting that "Section 1963(c) provides that any forfeitable property transferred to a third party shall be forfeited unless the transferee establishes that he was a bona fide purchaser for value of the property." *Opposition* at 9. To the contrary, Subsection (c) does only one thing: *viz.*, passes title to *racketeering proceeds* to the Government at the time of the offense. It does not apply to untainted assets such as McKinney's funds. Consequently, a bona fide purchaser hearing would have been inappropriate under the circumstances of this case and the district court did not conduct such a hearing.

On a petition for certiorari, the briefs and appendices of the parties constitute the "record" before the Court. As a result, the Court is unable to confirm independently the factual assertions of the parties. Instead, the Court must rely upon the representations of the attorneys who appear before it. In that regard, the Court has traditionally given considerable weight -- especially when a dispute arises -- to the representations of counsel for the Government. With that reliance comes the responsibility fastidiously to assure that record statements are above reproach. The Government has failed to discharge that responsibility here.

Perhaps that failure arises from the Government's haste to convince the Court that McKinney is not the type of person it should protect. In any event, our system of justice rests upon a simple -- but critically important -- principle: the rule of law, not of men. That principle cannot be honored if the Government does not confine itself to the record developed in the court of first instance. In advocating vigorously on behalf of the people, counsel for the Government should also not forget that their actions can have a devastating impact upon an individual's liberty and reputation.

2. The Government's misstatements of the record minimizes the detrimental impact of the Fourth Circuit's decision on legitimate commercial transactions. The Government flatly asserts that "there is no merit in [McKinney's] contention * * * that the decision below will have a substantial and detrimental impact on legitimate commercial transactions" because she received "forfeitable racketeering proceeds." *Opposition* at 11. It concludes that "McKinney was not an innocent third party." *Id.* at 12. Again, these assertion rest on the incorrect assumption that McKinney's assets are tainted and that she received them in a non-legitimate transaction.

Setting aside its mischaracterization of the record, the Government concedes that "the pretrial restraint of a RICO defendant's substitute assets may in some cases disrupt legitimate business transactions." *Opposition* at 12. "The legitimacy of a third party transaction * * * turns on whether the transferee had reason to believe that the transferred assets were forfeitable * * *." *Id.* This explanation conflates the issue of whether a transaction is ultimately *voidable* with that of whether it can be *challenged*. For business purposes, the prospect of litigating the propriety of a transaction is sufficient to impede or bar it. The Government admits that any *transaction involving a RICO defendant's untainted assets can give rise to a bona fide purchaser hearing under the unlimited restraint* authority permitted by the Fourth Circuit's decision. *Id.* The Government's assertion that the Fourth Circuit's decision will not have a far-reaching detrimental effect on legitimate business transactions is wishful thinking at best.

3. The Government does not squarely defend the Fourth Circuit's restraint of McKinney's legitimate assets. In their initial brief, Petitioners establish that the Fourth Circuit's decision contradicts the plain and

unambiguous language of the RICO restraint provisions. *Petition* at 4-5 & 12-16. The Government's argument to the contrary is half-hearted. The Government contends instead that substitute assets become subject to forfeiture and pre-trial restraint at the time that the racketeering proceeds are taken beyond the jurisdiction of the court. *Opposition* at 9. Rather than providing a uniform approach to restraint issues, the Government's contention creates a confusing distinction between types of substitute assets. That is, under the Government's theory, some substitute assets are subject to pre-trial restraint and others are not.

The plain terms of the RICO forfeiture provisions speak decidedly against such a distinction. Under those provisions, substitute assets are subject to forfeiture only *after* conviction, the return of a verdict of forfeiture, and an ascertainment of the availability of racketeering proceeds to satisfy that judgment. Furthermore, the Government articulates this position for the first time in argument to the Court. The Government has not sought to restrain any of Billman's assets in the United States. Nor did it attempt at the evidentiary hearing to establish that none of the alleged racketeering proceeds remained in the United States. Consequently, Petitioners had no opportunity to challenge the validity of the critical factual predicate underlying this argument.

Neither the Fourth Circuit nor the Government appear to recognize the confusion resulting from their interpretation of the RICO restraint and forfeiture provisions. By expanding Subsection (m) to include assets legitimately belonging to a third party and placing such assets within the scope of both the relation-back provision of Subsection (c) and the pre-trial restraint provision of Subsection (d)(1)(A), the resulting statutory framework vests title to non-tainted funds in three persons simultaneously. For example, in this case, the

funds belong to McKinney, the Government, and Billman. It is unreasonable to assume that Congress intended such a result.

4. The Government does not dispel the serious constitutional problems raised by the Fourth Circuit's decision.[5] The Government does not deny that the Fourth Circuit's decision extends the reach of the pre-trial restraint permitted in *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989) from racketeering proceeds to non-tainted assets. Rather, the Government argues that the indictment in this case establishes probable cause that *Billman* received racketeering proceeds. *Opposition* at 15. Petitioners do not dispute this, nor do they claim that Billman's tainted assets may not be restrained. The critical issue here is whether a restraint of *McKinney's* non-tainted assets violates her Sixth Amendment right to counsel. The Government also appears to seek comfort in the allegation in the indictment that McKinney helped place some portion of Billman's racketeering proceeds beyond the jurisdiction of the court. That allegation -- whether true or false --

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[5]In their initial brief, Petitioners also demonstrated that the Fourth Circuit ignored the statutory limitations and safeguards other courts have observed in applying the RICO forfeiture provisions. The Government's discussion is non-responsive. For example, in analyzing *Regan*, the Government states that "the court in *Regan* concluded that the district court could, as an alternative, restrain substitute assets of the individual defendants . . . ." *Opposition* at 13. This statement assumes that McKinney's assets are *substitute assets*, which they are not. In addition, it overlooks that the Second Circuit was discussing the restraint of such assets still in the hands of the RICO defendants. Both assumptions are contrary to the operative facts presented in this case. Finally, the Government leaves unaddressed the Second Circuit's determination that the *only* justification for a restraint of a third-party's untainted assets would be the preservation of racketeering proceeds, a matter not at issue here.

is not relevant to the Sixth Amendment analysis in *Caplin & Drysdale*. That allegation certainly does not convert McKinney's untainted assets into racketeering proceeds. "The forfeiture statute does not prevent a defendant who has non-forfeitable assets from retaining any attorney of his choosing." *Caplin & Drysdale*, 109 S. Ct. at 2652.

In their initial brief, Petitioners also establish that the Fourth Circuit's indefinite (and potentially permanent) restraint of McKinney's legitimate assets violates due process. The Government limits its response to the false allegation -- discussed above at 3-5 -- that McKinney is "presently sustaining" Billman as a fugitive. In addition, the Government appears to suggest that the Fourth Circuit's erroneous conclusion that McKinney's assets are *Billman's* substitute assets somehow constitutes a probable cause determination and satisfies due process. *Opposition* at 16. We are at a loss to understand how this suggestion is relevant to the due process analysis. In any event, it contradicts the undisputed finding that the funds "belong" to McKinney.

Conclusion

If the Court denies review, the Government will assuredly argue that the Fourth Circuit's decision stands for the very broad restraint authority it now suggests is not present. The plain and unambiguous language of the RICO pre-trial restraint provisions do not authorize the restraint of McKinney's funds. Those funds are legitimate, belong to her, and bear no connection to criminal activity. Those funds, and the constitutional safeguards embodied in the carefully-defined terms of the RICO restraint provisions, provide the only means she -- or any other defendant -- has to mount a defense and protect her liberty. For the foregoing reasons and those set forth in our initial brief, the Court should grant the petition for certiorari.

Respectfully submitted,

Abbe David Lowell
(Counsel of Record)
Ross A. Nabatoff
Max Hathaway

BRAND & LOWELL
(A Professional Corporation)
923 15th Street, N.W.
Washington, D.C. 20005
(202) 662-9700

(Of Counsel)
Graeme W. Bush
Albert G. Lauber, Jr.
Caplin & Drysdale
One Thomas Circle, N.W.
Washington, D.C. 20036

Eugene Gressman
Seton Hall University School of Law

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